No. 98-822-CFX Title: Friends of the Earth, Incorporated, et al., Petitioners
v.
Laidlaw Environmental Services (TOC), Inc.

Docketed:
November 18, 1998 Court: United States Court of Appeals for the Fourth Circuit

Entry	Date	Proceedings and Orders
	Oct 2 1998	Application (98A276) to extend the time to file a petition for a writ of certiorari from October 14, 1998 to November 13, 1998, submitted to The Chief Justice.
	Oct 7 1998	Application (98A276) granted by the Chief Justice extending the time to file until November 13, 1998.
	Nov 9 1998	Petition for writ of certiorari filed. (Response due January 15, 1999)
	Nov 9 1998	40 copies suppl. appdx. to petition for a writ of certiorari filed.
	Dec 10 1998	Order extending time to file response to petition until January 15, 1999.
	Jan 15 1999	Brief of respondent Laidlaw Environmental Services (TOC), Inc. in opposition filed.
	Jan 15 1999	Brief amici curiae of Natural Resources Defense Council, et al. filed.
	Jan 15 1999	Brief amici curiae of South Carolina Chamber of Commerce, et al. filed.
	Jan 15 1999	Motion of Public Citizen for leave to file a brief as amicus curiae filed.
	Jan 19 1999	Reply brief of petitioners Friends of the Earth, et al. filed.
	Jan 27 1999	DISTRIBUTED. February 19, 1999
	Feb 22 1999	REDISTRIBUTED. February 26, 1999
	Mar 1 1999	Motion of Public Citizen for leave to file a brief as amicus curiae GRANTED.
	Mar 1 1999	Petition GRANTED. SET FOR ARGUMENT October 12, 1999. **********
	Mar 23 1999	Order extending time to file brief of petitioner on the merits until May 17, 1999.
	May 14 1999	Order extending time to file respondent's brief on the merits to and including July 19, 1999.
	May 17 1999	Joint appendix filed.
	May 17 1999	Brief of petitioners Friends of the Earth, et al. filed.
	May 17 1999	Brief amicus curiae of Public Citizen, et al. filed.
	May 17 1999	Brief amicus curiae of Americans For the Environment filed.
	May 17 1999	Brief amicus curiae of United States filed.
	May 17 1999	Brief amici curiae of Natural Resources Defense Council, et al. filed.
	May 17 1999	Brief amici curiae of California, et al. filed.
	Jun 9 1999	Suggestion of mootness filed by respondent Laidlaw Environmental Services (TOC), Inc..
	Jun 15 1999	Brief of petitioners in response to suggestion of mootness filed.
	Jun 21 1999	Brief of respondent in reply to petitioners filed.

No. 98-822-CFX

Entry	Date	Proceedings and Orders
	Jun 21 1999	DISTRIBUTED. June 24, 1999 (Page 13)
	Jun 21 1999	Motion of Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Jun 24 1999	Further consideration of respondent's suggestion of mootness is deferred to hearing the case on the merits.
	Jul 15 1999	Brief amici curiae of Pacific Legal Foundation, et al. filed.
	Jul 19 1999	Brief of respondent Laidlaw Environmental Services (TOC), Inc. filed.
	Jul 19 1999	Brief amici curiae of Washington Legal Foundation, et al. filed.
	Jul 19 1999	Brief amicus curiae of California Municipalities and the Bay Planning Coalition filed.
	Jul 19 1999	Brief amicus curiae of Hercules Incorporated filed.
	Jul 19 1999	Brief amici curiae of Alliance of Automobile Manufacturers, et al. filed.
	Jul 19 1999	Brief amicus curiae of California Association of Sanitation Agencies filed.
	Jul 20 1999	Brief amicus curiae of South Carolina filed.
	Aug 13 1999	CIRCULATED.
	Aug 17 1999	Reply brief of petitioners Friends of the Earth, et al. filed.
	Sep 10 1999	Motion of Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Sep 24 1999	Record filed.
	Oct 8 1999	Record filed.
	Oct 12 1999	ARGUED.

Supreme Court, U.S.
FILED
98 822 NOV 9 1998
OFFICE OF THE CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

FRIENDS OF THE EARTH, et al.,
Petitioners,

v.

LAIDLAW ENVIRONMENTAL SERVICES (TOC), INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a citizen suit seeking civil penalties under Section 505 of the Clean Water Act is constitutionally moot under *Steel Co. v. Citizens for Better Environment*, 118 S. Ct. 1003 (1998), due to lack of redressability, where plaintiffs had standing at the time of the complaint and have shown continuing injury-in-fact but have not obtained injunctive relief.

2. Whether a citizen suit seeking civil penalties under Section 505 of the Clean Water Act is constitutionally moot under *Steel Co.*, due to lack of redressability, when the district court has rendered a declaratory judgment as to liability and the issue of liability was contested.

3. Whether plaintiffs could not be awarded attorneys' fees or litigation costs because the case was dismissed for mootness, even if the litigation was responsible for bringing the defendant into compliance with the Clean Water Act.

PARTIES TO THE PROCEEDING

The plaintiffs are Friends of the Earth, Citizens Local Environmental Action Network, Inc. ("CLEAN"), and the Sierra Club. The defendant was Laidlaw Environmental Services (TOC), Inc., now Safety-Kleen (Roebuck), Inc.

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PETITION FOR A WRIT OF CERTIORARI

Plaintiffs petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals was published at 149 F.3d 303 (4th Cir. 1998) and is reprinted in the Appendix ("App.") at 1a. The standing decision of the district court was unpublished. The preclusion decision of the district court was published at 890 F. Supp. 470 (D.S.C. 1995). The relief decision of the district court was published at 956 F. Supp. 588 (D.S.C. 1997).

JURISDICTION

The judgment of the court of appeals was entered on July 16, 1998 (App. 3a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). 28 U.S.C. 2403(a) applies to this action. The court of appeals did not certify this action pursuant to 28 U.S.C. 2403(a).

On October 7, 1998, plaintiffs were granted an extension of time to file their petition for a writ of certiorari.

STATUTES INVOLVED

The relevant sections of the Federal Water Pollution Control Act, 33 U.S.C. 1365(a), 1365(d), 1365(g), and 1319(d) are set forth in the Appendix at 10a.

STATUTORY BACKGROUND

Section 301(a) of the Clean Water Act, 33 U.S.C. 1311(a), states:

> Except as in compliance with this section and sections 302, 306, 307, 318, 402 and 404 of this act, the discharge of any pollutant by any person shall be unlawful.

"The Act makes unlawful the discharge of any pollutant into navigable waters except as authorized by specific sections of the Act." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.* 484 U.S. 49, 52 (1987). The Act provides for the issuance of discharge permits. 33 U.S.C. 1341-1345. Compliance with a permit issued pursuant to one of the permit programs established by the Act is deemed compliance with Section 301 of the Act and allows discharges which would otherwise be unlawful. *See* 33 U.S.C. 1342(k), 1344(p). Conversely, noncompliance with a permit constitutes noncompliance with Section 301 and is a violation of the Act.

Section 402(a) of the Act, 33 U.S.C. 1342(a), provides for the issuance of Natural Pollutant Discharge Elimination System ("NPDES") permits to allow the discharge of wastewater. The Act requires each NPDES permit to: (a) include discharge limitations; (b) require the permittee to be in compliance with the discharge limitations

in the permit; and (c) require the permittee to monitor its discharges as the United States Environmental Agency ("EPA") requires and report the results accurately to EPA and the state in its discharge monitoring reports ("DMR's"). 33 U.S.C. 1342.

Section 505(a) of the Act, 33 U.S.C. 1365(a) (App. 10a), allows any "citizen" to bring suit to enforce any limitation in an NPDES permit. That section specifically authorizes the courts to issue injunctive relief and impose civil penalties. Section 505(g), 33 U.S.C. 1365(g) (App. 11a), defines citizen as "a person or persons having an interest which is or may be adversely affected."

STATEMENT OF THE CASE

Defendant Laidlaw operates a hazardous waste incinerator. 956 F. Supp. at 593. As part of its operation, Laidlaw discharges wastewater into the North Tyger River pursuant to the NPDES permit issued by the South Carolina Department of Health and Environmental Control ("DHEC"). *Ibid.* The applicable permit limited the discharge of specified pollutants, including mercury, lead, nickel, arsenic, cadmium, chromium and zinc. *Ibid.* It also required Laidlaw to monitor its discharge and report the level of pollutants discharged to EPA and DHEC. *Ibid.* From January 1986 through January 1995, Laidlaw violated its permit limitation for mercury 489 times. 956 F. Supp. at 613-621. Laidlaw also violated its non-mercury metals discharge limitations and its pH limitation 439 times. J.A. 380-392. In addition, it violated the monitoring requirements of its permit 420 times and the reporting requirements 503 times. 956 F. Supp. at 610.

Laidlaw's discharge violations were due to an inadequate treatment system and its failure to control

adequately its mercury feed rate, i.e., the amount of mercury in the waste fed into the incinerator. 890 F. Supp. at 478. Laidlaw gradually added treatment equipment from 1987 to 1991. *Id.* at 482. The Lancy system, installed in 1991, corrected most of Laidlaw's non-mercury metals violations. *Id.* at 483. However, Laidlaw's mercury violations increased in early 1992. Laidlaw violated its mercury limitation 103 times from January 1992 through May 1992, the period immediately prior to the filing of the complaint in this case, including violations as much as 13 times over its permit limitation. *Id.* at 619-621. The increase in violations is explained by Laidlaw's failure to control its mercury feed rate, which it knew was needed to achieve compliance after the installation of the Lancy system. J.A. 598; Def. Exs. 105, 144; Pl. Ex. 143; Pl. Ex. 126, figure 1; Stipulation of December 11, 1996, Appendix 1, pp. 16-19.

In July 1992, a month after plaintiffs filed suit, Laidlaw reduced its mercury feed rate and installed new carbon adsorption equipment. 890 F. Supp. at 483; Pl. Ex. 126, figure 1; Pl. Ex. 143. In January 1993, Laidlaw installed equipment that aided the performance of the carbon filters in removing mercury. 890 F. Supp. at 483. As a result, the number and severity of its mercury violations dropped. 956 F. Supp. at 621. Nonetheless, Laidlaw violated the mercury discharge limitations in its permit 13 times after the complaint was filed. *Ibid.*

Plaintiffs, Friends of the Earth, CLEAN and the Sierra Club, brought this action on June 12, 1992, under the citizen suit provision of the Clean Water Act, Section 505, 33 U.S.C. 1365 (App. 10a), to enforce the terms and conditions of Laidlaw's permit. Laidlaw moved to dismiss Friends of the Earth, but not the other plaintiffs, for lack of standing on the ground that its members had not suffered injury-in-fact.

On June 30, 1993, the district court denied the motion. J.A. 13.

Laidlaw subsequently moved to dismiss under Section 505(b)(1)(B) of the Act, 33 U.S.C. 1365(b)(1)(B), on the ground that the suit was precluded because the State had brought an action in state court against Laidlaw three days before plaintiffs' action was filed. 890 F. Supp. at 474. The complaint in the state case had been drafted and filed by Laidlaw's counsel and the filing fee was paid by Laidlaw. *Id.* at 479. The complaint was filed at the request of Laidlaw for the purpose of barring plaintiffs' suit. *Id.* at 478. The district court denied the motion after a seven-day evidentiary hearing on the ground that the state action had not been diligently prosecuted for a number of reasons, but primarily because the $100,000 penalty did not remove the economic benefit enjoyed by Laidlaw as the result of its delayed compliance. *Id.* at 489-491, 497-499.

On June 27, 1995, the district court denied plaintiffs' motion for summary judgment for Laidlaw's violations. J.A. 23. On that same date, the district court granted Laidlaw's motion for summary judgment on all of its non-mercury discharge violations based on this Court's decision in *Gwaltney*, since none of the other permit limitations had been violated subsequent to the filing of the complaint. 956 F. Supp. at 592.

On July 31, 1995, the district court began a three-day trial on liability and relief. 956 F. Supp at 592. At the conclusion of the testimony, the district court reserved decision until a decision was issued in a state administrative proceeding involving a challenge to a change in the mercury limitation in Laidlaw's permit. *Ibid.* As a result, the district court did not issue its decision until January 22, 1997.

The district court found that Laidlaw had violated the mercury limitations in its permit 489 times, including 13 times after the complaint in this case was filed. 956 F. Supp. at 600, 621. The court also found that Laidlaw had violated the monitoring requirements in its permit 420 times and the reporting requirements 503 times, including 13 monitoring and 10 reporting violations after the complaint was filed. *Id.* at 600-601. The court found that Laidlaw had enjoyed an economic benefit of $1,092,581 from its violation of its permit. *Id.* at 606. However, the court concluded that a penalty of $405,800 was an adequate deterrent, when considered with the attorneys' fees award that Laidlaw would be required to pay to plaintiffs and Laidlaw's own litigation expenses. *Id.* at 610-611. The district court denied plaintiffs' request for injunctive relief because Laidlaw had achieved substantial compliance with its permit. *Id.* at 611.

Both sides appealed the district court's decisions. Laidlaw appealed, *inter alia*, on the ground that Friends of the Earth lacked standing because of its alleged failure to show injury-in-fact. The day before oral argument in the court of appeals, on March 4, 1998, this Court decided *Steel Co. v. Citizens for a Better Environment*, 118 S. Ct. 1003 (1998). On March 10, 1998, plaintiffs filed a motion asking the court of appeals for the opportunity to submit a brief showing that the decision in *Steel Co.* had no application. Laidlaw responded that *Steel Co.* "is largely irrelevant to the standing issue before this Court." Defendant-Appellee's Opposition to Plaintiffs' Motion for Leave to File an Additional Brief, March 18, 1998, p. 1. On April 7, 1998, the court of appeals granted plaintiffs' motion and directed the parties to brief the applicability of *Steel Co.*

In addition to the parties, the United States filed a brief as amicus curiae, arguing that *Steel Co.* did not apply

since that decision addressed standing at the time the case was filed as opposed to mootness later in the litigation. Supplemental Brief for the United States as *Amicus Curiae* in Support of Plaintiffs-Appellants, *Friends of the Earth, Inc v. Laidlaw Environmental Services (TOC), Inc.*, 4th Cir., Nos. 97-1246 and 97-1261, pp. 8-9 (App. 28a). The United States further contended that post-complaint compliance and the absence of injunctive relief do not render a request for civil penalties moot, unless the "defendant has carried its heavy burden of demonstrating that violations cannot reasonably be expected to recur * * *." *Id.*, p. 9 (App. 29a). The United States explained: "Where a defendant has a direct financial incentive to resume conduct that is illegal, cessation of illegal activity -- even if accompanied by a substantial period of compliance during the lawsuit -- is unlikely to be sufficient to make 'absolutely clear' that there is 'no reasonable expectation that the wrong will be repeated. *See Gwaltney*, 484 U.S. at 66-67; *see also W.T. Grant Co.*, 345 U.S. at 632-33 * * *." *Id.*, p. 10 (App. 29a-30a).

The court of appeals vacated and remanded with instructions to dismiss on the ground that the case was moot based on this Court's decision in *Steel Co.* App. 8a-9a. In doing so, it ignored the distinction between initial standing and mootness and applied the standing analysis in *Steel Co.* to the issue whether a case has become moot. It assumed "without deciding that Plaintiffs had standing to initiate this action and have proven a continuous injury in fact." App. 7a, n. 3. It reasoned that "[b]ecause Plaintiffs have not appealed the denial of declaratory and injunctive relief, the only potential relief that may be available to redress their claimed injuries is the civil penalty imposed upon Laidlaw" and "[s]uch penalties * * * cannot redress any injury suffered by a citizen plaintiff." App. 7a.

REASONS FOR GRANTING THE PETITION

1. The court of appeals' decision is directly inconsistent with this Court's decision in *Gwaltney*. The court of appeals assumed that plaintiffs' members had suffered injury-in-fact and that the injury was continuing at the time the complaint was filed. App. 7a, n. 3. Nevertheless it decided that plaintiffs had not satisfied the redressability requirement for standing and that therefore plaintiffs' request for civil penalties was moot solely on the ground that the district court had not granted declaratory or injunctive relief and the denial of such relief had not been appealed. This application of the *Steel Co.* standing analysis to a post-complaint mootness issue puts the decision below in direct conflict with this Court's decision in *Gwaltney*, where, despite facts nearly identical to those here, this Court concluded that the case was not moot.[1/]

In *Gwaltney*, as in this case, the district court had not issued injunctive relief and the plaintiffs had not appealed the issue to the court of appeals. *Chesapeake Bay Foundation, Inc. v. Gwaltney of Smithfield, Ltd.*, 890 F.2d 690, 692 (4th Cir. 1989). Consequently, by the time the case reached this Court, there was no possibility that injunctive relief would issue and the sole remaining claim was for civil penalties. This fact was specifically pointed out by petitioner in this Court. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*, No. 86-473, Oct. Term 1987, Reply Br. for Petitioner, p. 16 (App. 40a). *See* 484 U.S. at 66. Moreover,

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1/The only difference between *Gwaltney* and the present case is, as we will discuss below (p. 17), that Laidlaw's violations continued after the complaint was filed whereas, in *Gwaltney*, the last violation was a month before the filing of the complaint. 484 U.S. at 53-54.

the petitioner in *Gwaltney* made the identical redressability argument that the court of appeals adopted in the present case. *Ibid.*

Nonetheless, this Court specifically held that the plaintiffs had constitutional standing under Article III to impose civil penalties despite the fact that injunctive relief was no longer being sought. 484 U.S. at 64-66. The Court further made clear that the case was not moot, despite the fact that the possibility of injunctive relief had been eliminated from the case. In response to petitioner's mootness argument, which specifically raised the issue of redressability, this Court discussed the applicability of mootness to citizen suits generally under the Clean Water Act. 484 U.S. at 66-67. *See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*, No. 86-473, Oct. Term 1987, Reply Br. for Petitioner, pp. 15-18 (App. 39a-43a). The Court did not find that the case was moot since, in the paragraph immediately following the discussion of mootness, it stated that it was remanding the case for a determination whether the complaint's allegation of continuing violations was made in good faith. 484 U.S. 67. If the absence of injunctive relief ipso facto rendered the case moot, there would have been no possible purpose to a remand.

Even if this Court had not specifically discussed the applicability of the mootness doctrine to citizen suits under the Clean Water Act in *Gwaltney*, it would have still been clear that the Court necessarily rejected the mootness argument of the petitioners in that case. This Court emphasized in *Steel Co.* that it is the practice of this Court to determine jurisdictional issues before dealing with the merits. 118 S. Ct. at 1012-1013. This rule applies just as much to mootness as to standing. As the Court stated in *United States v. Munsingwear*, 340 U.S. 36, 39 (1950):

> The established practice of this Court in dealing with a civil case from a court in the federal system which has become moot on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss.

It would therefore have been inconsistent with Article III of the Constitution and this Court's "established practice" for the Court to have ignored in *Gwaltney* a substantial jurisdictional issue that had been specifically raised before it.

This Court's refusal to dismiss *Gwaltney* on the ground of mootness because no injunctive relief had issued is consistent with the difference in the standards for issuing injunctions and dismissing on the ground of mootness. Injunctive relief requires plaintiffs to prove the likelihood of irreparable harm. As we will see below (pp. 17-19), mootness requires proof by defendants to a virtual certainty that the risk of harm has ceased. Thus, there are numerous intermediate situations where neither injunctive relief nor dismissal based on mootness is proper. *See, e.g., United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968)(even though the defendant on remand might be able to show that injunctive relief was inappropriate, the case was not moot); *United States v. W.T. Grant Co.*, 345 U.S. 629, 635-636 (1953) ("We conclude that, although the actions were not moot, no abuse of discretion has been demonstrated in the trial court's refusal to award injunctive relief").

The court of appeals in the instant case did not discuss or address *Gwaltney*, despite its direct relevance to

the court of appeals' mootness determination.[2/]

Instead, it based its decision on *Steel Co.* However, *Steel Co.* clearly did not overrule *Gwaltney*. This Court explicitly stated in *Steel Co.* that "Article III standing was * * * found [in *Gwaltney*]." 118 S. Ct. at 1011. Moreover, the Court relied in *Steel Co.* on the holding in *Gwaltney* in its detailed discussion of the requirement that courts must determine standing as a threshold matter before considering other issues in the case. *Id.* at 1009-1016.

Steel Co. involved the issue of standing, whereas *Gwaltney* involved mootness. *Steel Co.* involved a situation

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2/Plaintiffs relied heavily on *Gwaltney* throughout their brief on the *Steel Co.* issue in the court below. *See* Second Supplemental Brief for Appellants, April 24, 1998. In response, the court of appeals did not even mention *Gwaltney*, except to reject it with a "but see" citation on the separate attorneys' fee issue. *See* pp. 20-22 below. Plaintiffs submit that this was not an oversight; *Gwaltney* simply cannot be squared with the court of appeals' holding.

Indeed, a district court has held that the decision of the court of appeals in the present case implicitly overturned the court of appeals' prior decision in *Chesapeake Bay Foundation, Inc. v. Gwaltney of Smithfield, Ltd.*, *supra*, 890 F.2d at 696-697, which held that "the mooting of a claim for injunctive relief does not moot a claim for CWA civil penalties" (emphasis in original). *Dubois v. U.S. Dep't of Agriculture*, D.N.H., September 30, 1998, 1990 U.S. Dist. LEXIS 15198, * 12, n. 4. The district court did not note, however, that the court of appeals in the present case implicitly overturned this Court's decision in *Gwaltney* as well.

where the complaint contained no allegation of a continuing violation as this Court emphasized repeatedly. 118 S. Ct. at 1008, 1011, 1019. In *Gwaltney*, the complaint alleged continuing violation. 484 U.S. at 54.

This Court in *Steel Co.* emphasized the difference between standing and mootness (118 S. Ct. at 1019-1020):

> The United States, as *amicus curiae*, argues that the injunctive relief does constitute remediation because "there is a presumption of future injury when this defendant has voluntarily ceased its illegal activity in response to litigation," even if that occurs before a complaint is filed. * * * The "presumption" the Government refers to has been applied to refute the assertion of mootness by a defendant who, when sued in a complaint that alleges present or threatened injury, ceases the complained-of activity. See *e.g., United States v. W.T. Grant Co.*, 345 U.S. 629 (1953). It is an immense and unacceptable stretch to call the presumption into service as a substitute for the allegation of present or threatened injury upon which initial standing must be based.

Thus, *Steel Co.* carefully distinguished between initial standing and mootness. *Id.* at 1020.

The facts in the case are like those in *Gwaltney*, not *Steel Co.*, except that here there were post-complaint violations. The complaint here alleged continuing violations. The court of appeals here assumed standing and continuing violations at the time the complaint was filed. App. 7a, n. 3.

The issue here is therefore not standing as in *Steel Co.* but mootness as in *Gwaltney*. The issue is whether plaintiffs' request for civil penalties became moot on appeal because no injunctive relief had issued. Thus, the decision of the court of appeals below is not supported by *Steel Co.* and is directly inconsistent with *Gwaltney*.

2. Six courts of appeals have held that claims for penalties in citizen suits under the Clean Water Act are not moot even through claims for injunctive relief were no longer viable because the defendants had brought themselves into compliance with the Act. *Comfort Lake Ass'n, Inc. v. Dresel Contracting, Inc.*, 138 F.3d 351, 356 (8th Cir. 1998); *Atlantic States Legal Foundation, Inc. v. Stroh Die Casting Co.*, 116 F.3d 814, 820 (7th Cir. 1997), *certiorari denied*, 118 S. Ct. 442 (1997); *Natural Resources Defense Council, Inc. v. Texaco Refining and Manufacturing, Inc.*, 2 F.3d 493, 503-504 (3d Cir. 1993); *Atlantic States Legal Foundation, Inc. v. Pan American Tanning Corp.*, 993 F.2d 1017, 1020-1021 (2d Cir. 1993); *Atlantic States Legal Foundation, Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1135-1136 (11th Cir. 1990); *Pawtuxent Cove Marina, Inc. v. Ciba-Geigy Corp.*, 807 F.2d 1089, 1094 (1st Cir. 1986), *certiorari denied*, 484 U.S. 975 (1987). *See also Carr v. Alta Verde Industries, Inc.*, 931 F.2d 1055, 1065, n. 9 (5th Cir. 1991)(dictum). The decision of the court of appeals in this case is directly inconsistent with these decisions.

These cases are directly supported by the holding of this Court in *Powell v. McCormick*, 395 U.S. 486, 498-499 (1969). There, the Court held that a case is not moot where, as here, a monetary remedy is "hotly contested." *Id.* at 498. This Court said that an outstanding issue of monetary relief was itself sufficient to supply the constitutional requirement of a case or controversy, even though the primary remedy

sought in the case, injunctive relief, was no longer needed. Thus, this Court, like the six court of appeals, separated the issue of mootness for civil penalties from mootness for injunctive relief.

As noted above, this Court discussed in *Gwaltney* the applicability of the mootness doctrine to citizen suits under the Clean Water Act. However, in doing so, it did not indicate that it was dealing with civil penalties. All of the cases cited related to injunctive relief. Thus, there was no suggestion that claims for civil penalties based on violations over which the federal courts had jurisdiction could be barred retroactively based on mootness.

3. The court below concluded that civil penalties could not support redressability on the ground that this Court in *Steel Co.* had found that "any civil penalties imposed would be payable to the United States Treasury and not to the plaintiff and therefore that the penalties would not benefit the plaintiff." App. 8a. This holding was based on this Court's statement in *Steel Co.*, that the plaintiff's claim for civil penalties did not satisfy the redressability requirement for standing because (118 S. Ct. at 1018-1019):

> By the mere bringing of his suit, *every* plaintiff demonstrates his belief that a favorable judgment will make him happier. But although a suitor may derive great comfort and joy from the fact that the United States Treasury is not cheated, that a wrongdoer gets his just deserts, or that the nation's laws are faithfully enforced, that psychic satisfaction is not an acceptable Article III remedy because it does not redress any cognizable Article III injury. (emphasis

in original)

However, that statement was made by the Court in determining the initial standing of the plaintiff. The Court sharply distinguished in *Steel Co.* the situation where the plaintiff has not alleged a continuing violation from the situation where a continuing violation has been alleged and the violation and injury-in-fact continued after the filing of the complaint. 118 S. Ct. at 1019, 1020.

The interpretation by the court of appeals of this Court's holding in *Steel Co.* would make that decision directly inconsistent with this Court's decisions in *Tull v. United States*, 481 U.S. 412, 422-423 (1987), and *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 314 (1982). In *Weinberger v. Romero-Barcelo*, this Court, in a similar citizen suit under the Clean Water Act, stated that "[a]n injunction is not the only means of ensuring compliance" and then cited penalties. 456 U.S. at 314. Here, the court of appeals entirely ignored the fact that civil penalties, like injunctive relief, redress harm to the plaintiff by deterring continued and future violation of the statute. This Court in *Tull* and *Romero-Barcelo* explicitly noted the deterrent effect of civil penalties imposed under the Clean Water Act on future violations. Congress likewise has specifically concluded, in discussing civil penalties under the Water Act, that citizen suits "have deterred violators and achieved significant compliance gains." S. Rep. No. 50, 90th Cong., 1st Sess. 28 (1985). *See also* S. Rep. No. 228, 101st Cong., 1st Sess. 373 (1989) "[t]he assessment of civil penalties for violations of the [Clean Air] Act [is] necessary for

deterrence, restitution and retribution").[3/] Thus, where violations are alleged in the complaint and are in fact continuing after the suit has been filed, civil penalties effectively bring violators into compliance and induce them to continue to comply. Therefore, civil penalties, according to both this Court and Congress, provide redress for the harm to the plaintiffs.

Even, if contrary to our argument above, this Court's decision in *Gwaltney* did not determine that the case was not moot, it surely determined that civil penalties could redress violations that continued subsequent to the filing of the complaint. Since, as we have noted (p. 8), civil penalties were the sole relief left in the case and this Court upheld plaintiffs' standing, it necessarily held that civil penalties can provide redressability for the defendant's continuing violations.

Here, the district court made clear that, in denying injunctive relief, it was not finding that violations of the permit would not occur in the future. It specifically stated that "a defendant in substantial compliance with its NPDES permit is not required to show that there is no chance of a future permit violation in order to defeat a request for injunctive relief." 956 F. Supp. at 611. It further stated that "[t]aken together, this court believes the above penalty, potential fee awards, and Laidlaw's own direct and indirect litigation expenses provide adequate deterrence under the circumstances of this case." *Ibid.* Thus, the district court specifically found that the penalty it imposed would be a deterrent to possible future violations.

3/Congress' determination as to the effect of civil penalties is entitled to substantial deference. *See, e.g., Preseault v. Interstate Commerce Commission*, 494 U.S. 1, 17 (1990).

4. Even if the court of appeals had not assumed continuing injury but had decided that no continuing injury existed, its decision to dismiss this case would still have been directly inconsistent with this Court's decision in *Gwaltney*. In *Gwaltney*, the defendant's last violation had occurred a month before the complaint was filed and 3 and 1/2 years before this Court issued its decision. 484 U.S. at 53-54. Nevertheless, as noted above, this Court did not dismiss, but instead remanded the case to determine whether the allegation of continuing violations in the complaint was made in good faith. *Id.* at 67. Subsequently, on remand, the Court of Appeals for the Fourth Circuit affirmed the district court's holding that the plaintiff had proved a continuing violation at the time of the complaint, even though there had been no violations for 5 and 1/2 years. *Chesapeake Bay Foundation, Inc. v. Gwaltney of Smithfield, Ltd.*, *supra*, 890 F.2d at 695.

In comparison, Laidlaw's last violation occurred in January 1995. 956 F. Supp. at 621. Thirty-six of Laidlaw's violations occurred after the complaint was filed. *Id.* at 600-601. There were numerous violations for 4 months and sporadic violations for 2 and 1/2 years after the complaint was filed. *Id.* at 621. Thus, if, as this Court necessarily found, the plaintiffs in *Gwaltney* were suffering continuing injury, based on pre-complaint violations sufficient to prevent mootness, *a fortiori*, so were plaintiffs in the present case.

5. This Court's decisions in *Gwaltney* and *Steel Co.* explain why plaintiffs in *Gwaltney* and in this case have suffered continuing injury. In *Gwaltney*, this Court set forth the following strict limitation on the applicability of the mootness doctrine in terminating cases as to which the federal courts had jurisdiction when the suit was brought (484 U.S. at 66):

> Long-standing principles of mootness * * * prevent the maintenance of suit when "there is no reasonable expectation that the wrong will be repeated." *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953) * * *. In seeking to have a case dismissed as moot, however, the defendant's burden "is a heavy one." 345 U.S. at 633. The defendant must demonstrate that it is "*absolutely clear* that the allegedly wrongful behavior could not be reasonably expected to recur." *United States v. Phosphate Export Ass'n, Inc.*, 393 U.S. 199, 203 (1968) (emphasis added [by this Court in *Gwaltney*]).

As we have seen above (p. 12), this Court in *Steel Co.* made clear the difference between the strict limitations of the mootness doctrine and the standing principles that apply to the initiation of a case. Citing *United States v. W.T. Grant Co.*, just as in *Gwaltney*, the Court approved the government's contention that there is a presumption "of [future] injury when the defendant has voluntarily ceased its illegal activity in response to litigation." 118 S. Ct. at 1019. Since plaintiffs here alleged future violations and defendant's violations in fact continued after the complaint was filed, the presumption of future injury referred to by the United States, and recognized by the Court in both *Gwaltney* and *Steel Co.*, applies. *See also Cardinal Chemical Co. v. Morton International, Inc.*, 508 U.S. 83, 98 (1993) ("If a party to an appeal suggests that the controversy has, since the rendering of judgment below, become moot, that party bears the burden of coming forward with the subsequent events that have produced that alleged result"). The decision of the court of appeals below ignores the distinction between standing and mootness.

There is no evidence in the present case that makes it "absolutely clear that the allegedly wrongful behavior could not be reasonably expected to recur." On the contrary, a substantial part of Laidlaw's remedy for its violations involved its decision to reduce the mercury content of the waste it fed into its incinerator. 890 F. Supp. at 478, 483; J.A. 124. Laidlaw had reduced the mercury content in the past and subsequently increased it. J.A. 598; Pl. Ex. 131-132; Def. Exs. 105, 144. Laidlaw could easily change its practice again at any time in the future.

6. This Court held in *Steel Co.* that a declaratory judgment as to liability does not support the redressability requirement of standing where the issue of liability was not contested (118 S. Ct. at 1018):

> There being no controversy over whether petitioner failed to file reports, or over whether such a failure constitutes a violation, the declaratory judgment is not only worthless to respondent, it is seemingly worthless to all the world.

Here, plaintiffs sought a declaratory judgment as to liability. J.A. 8. Laidlaw's answer denied all of allegations in plaintiffs' amended complaint that Laidlaw had violated the discharge, monitoring and reporting requirements of its permit. Amended Complaint, para. 27; Answer, para. 26. When plaintiffs moved for partial summary judgment on all of Laidlaw's violations, Laidlaw opposed summary judgment on its mercury discharge violations on the ground that the permit was erroneous. Defendant's Response in Opposition to Plaintiffs' Motion for Partial Summary Judgment, June 7, 1995, p. 3. Laidlaw argued that "most of the alleged monitoring violations are incorrect" (*ibid.*) and that most of

the reporting violations likewise did not occur (*id.*, p. 5). At trial, Laidlaw continued to dispute the monitoring and reporting violations. Tr., 7/31/95, p. 11. After trial, while it no longer disputed the discharge violations, Laidlaw continued to dispute most of the monitoring and reporting violations. Defendant's Proposed Findings of Fact and Conclusions of Law, October 13, 1995, pp. 12-15. Thus, defendant did not concede its mercury discharge violations until three years after the start of the litigation and never conceded its monitoring and reporting violations.

Contrary to the conclusion of the court of appeals, the district court did effectively issue a declaratory judgment. It determined that Laidlaw was liable for 489 discharge, 420 monitoring, and 503 reporting violations. 956 F. Supp. at 610, 613-621. This determination was far from worthless; it determined that defendant had engaged in repeated, flagrant and long-standing violation of federal law. Thus, the decision of the court of appeals is in conflict with *Steel Co.* even if *Steel Co.* fully applies to cases where the plaintiffs have standing and the issue involves mootness because of the defendant's subsequent compliance.

7. In *Gwaltney*, this Court stated (484 U.S. at 67, n. 6):

> Under the Act, plaintiffs are also protected from the suddenly repentant defendant by the authority of the district courts to award litigation costs "whenever the court determines such award is appropriate." 33 U.S.C. § 1365(d). The legislative history of this provision states explicitly that the award of costs" should extend to plaintiffs in action

> which result in successful abatement but do not reach a verdict. For instance, if as a result of a citizen proceeding and believe a verdict is issued, a defendant abated a violation, the court may award litigation expenses borne by the plaintiff in prosecuting such actions." S. Rep. No. 92-414, p. 81 (1971), 2 Leg. Hist. 1499.

The court of appeals' decision that plaintiffs are not entitled to attorneys' fees is directly inconsistent with this dictum, other decisions of this Court and decisions of nine other circuits.

The court of appeals held that "Plaintiffs' failure to obtain relief on the merits of their claims precludes any recovery of attorneys' fees or other litigation costs because such an award is available only to a 'prevailing or substantially prevailing party.' 33 U.S.C.A. §1365(d) * * *." App. 9a, n. 5. The court of appeals relied on this Court's decision in *Farrar v. Hobby*, 506 U.S. 103 (1992), and an earlier decision of its own, *S-1 & S-2 v. State Board of Education*, 21 F.3d 49 (1994)(en banc), in which it had held that plaintiffs who had obtained a judgment that was subsequently vacated because of mootness were not prevailing parties. App. 9a, n. 5.

The court of appeals implicitly, but clearly, admitted that its decision on attorneys' fees was inconsistent with this Court's dictum in *Gwaltney*. It did so by prefacing its citation to *Gwaltney* with "But see." App. 9a, n. 5. Such a citation of an opinion of this Court by a court of appeals is, to say the least, unusual. The court of appeals' only explanation for doing so was to note that this Court discussed the prior language of Section 505(d) of the Act, rather than

the language of the 1987 amendment to Section 505(d), which had been passed shortly before this Court's opinion. Thus, the court of appeals decided to ignore this Court's dictum in *Gwaltney* because it believed that the dictum was erroneous.

This Court's dictum in *Gwaltney* was not erroneous. The legislative history of the 1987 amendment to Section 505(d) shows that the change in the language of Section 505(d) was intended merely to clarify Congress' intent that citizen plaintiffs not receive attorneys' fee awards when the plaintiffs had lost the litigation. S. Rep. No. 50, 99th Cong., 1st Sess. 33 (1985); S. Rep. No. 233, 98th Cong., 1st Sess. 24-25 (1983); A Legislative History of the Water Quality Act of 1987, 100th Cong., 2d Sess., Sen. Print 144 (Nov. 1988), vol. 2, pp. 1311-1312 (remarks of Senator Chafee, the sponsor of the legislation).[4/] The Senate reports specifically state that the plaintiff may prevail as the result of settlement rather than through a court order. It equally follows that a citizen prevails through the defendant bringing itself into compliance with the statute.

In addition to this Court's dictum in *Gwaltney*, the decision below conflicts with other decisions of this Court. In *Hewitt v. Helms*, 482 U.S. 755, 760-761 (1987), this Court stated:

> It is settled law, of course, that relief need not

4/Congress' compiled legislative history of the 1987 amendments includes Senate Report 50 and Senate Report 233. *See* A Legislative History of the Water Quality Act of 1987 (Public Law 100-4) Including Public Law 97-440; Public Law 97-117; Public Law 96-483; and Public Law 96-148, pp. 1420-1545, 2195-2216 (November 1988).

> be judicially decreed in order to justify a fee award under § 1988. A lawsuit sometimes produces voluntary action by the defendant that affords the plaintiff all or some of the relief he sought through a judgment - *e.g.*, * * * a change in conduct that redresses the plaintiff's grievances. When that occurs, the plaintiff is deemed to have prevailed despite the absence of a formal judgment in his favor.

The Court went on to say that "in a declaratory judgment action: if the defendant, under pressure of the lawsuit, alters his conduct (or threatened conduct) towards the plaintiff that was the basis for the suit, the plaintiff will have prevailed. *That* is the proper equivalent of a judicial judgment which would produce the same effect * * *" (emphasis in original). *Id.* at 761.[5/]

In *Maher v. Gagne*, 448 U.S. 122, 129 (1980), in holding that a settlement was adequate to confer prevailing party status, the Court quoted a Senate report that stated that "for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights * * * without formally obtaining relief." *See* S. Rep. No. 1011, 94th Cong., 2d Sess. 5 (1976). *Accord Hanrahan v. Hampton*, 446 U.S. 754, 756-757 (1979). *See also* H. Rep. No. 1558, 94th Cong., 2d Sess. 7 (1976) ("Similarly, after a complaint is filed a defendant might voluntarily cease the

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5/The plaintiff in *Hewitt* was denied fees because the changes in prison policies would not benefit him since he was no longer in custody. 482 U.S. at 763. However, here, since plaintiffs' members continue to use the affected waters, they benefit from defendant's compliance with the Clean Water Act.

unlawful practice. A court might still award fees even though it might conclude, as a matter of equity that no formal relief, such as an injunction, is needed").

Moreover, the position of the Court of Appeals for the Fourth Circuit in the decision below and *S-1 & S-2 v. State Board of Education* is inconsistent with the decisions of nine other Circuits which have been decided subsequent to this Court's decision in *Farrar*. *Comfort Lake Ass'n, Inc. v. Dresel Contracting, Inc.*, *supra*, 138 F.3d at 357-358; *Maduka v. Meissner*, 114 F.3d 1240, 1241 (D.C. Cir. 1997); *Zinn by Blankenship v. Shalala*, 35 F.3d 273, 274-276 (7th Cir. 1994); *Baumgartner v. Harrisburg Housing Authority*, 21 F.3d 541, 546-550 (3d Cir. 1994); *LaRouche v. Kezer*, 20 F.3d 68, 71, n. 4 (2d Cir. 1994); *Little Rock School District v. Pulaski County Special School District*, 17 F.3d 260, 263 and n. 2 (8th Cir. 1994); *American Council for the Blind of Colorado, Inc. v. Romer*, 992 F.2d 249, 250 (10th Cir. 1993), *certiorari denied*, 510 U.S. 864 (1993); *Craig v. Gregg County, Texas*, 988 F.2d 18, 20-21 (5th Cir. 1993); *Paris v. U.S. Department of Housing and Urban Development*, 988 F.2d 236, 240-241 (1st Cir. 1993); *Pembroke v. Wood County, Texas*, 981 F.2d 225, 231, n. 27 (5th Cir. 1993), *certiorari denied*, 508 U.S. 973 (1993); *Citizens Against Tax Waste v. Westerville City School*, 985 F.2d 255, 257-258 (6th Cir. 1993). These decisions hold that, even if the plaintiff has not obtained relief from the court, it is entitled to attorneys' fees if it has in fact obtained a significant part of the relief requested and the litigation was a catalytic or substantial factor in obtaining that relief.[6/]

6/However, the courts of appeals have held that plaintiffs are not entitled to attorneys' fees, even if they have obtained relief because of the litigation, if the court lacked jurisdiction from the start of the litigation. *E.g.*, *Lundon v. Meehan*, 980 F.2d 1450, 1461-1462 (D.C. Cir. 1992); *W.G. ex rel. D.G. v. Senatore*, 18 F.3d 60, 64 (2d Cir. 1994). Since the court below assumed that plaintiffs had standing to initiate this action (App. 7a, n. 3), these cases are inapplicable.

The decisions of the nine other Circuits are fully consistent with this Court's decision in *Farrar*. In *Farrar*, the Court stated that "to qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim." 506 U.S. at 111. However, the Court went on to say (*ibid.*):

> Whatever relief the plaintiff secures must directly benefit him at the time of the judgment or settlement. Otherwise the judgment or settlement cannot be said to "affec[t] the behavior of the defendant toward the plaintiff." Only under these circumstances can civil rights litigation effect "the material alteration of the legal relationship of the parties" and thereby transform the plaintiff into a prevailing party. (citations omitted)

This is a case which was properly brought. As the district court held and the court of appeals assumed, the district court had jurisdiction when the case was filed. Plaintiffs obtained relief by bringing Laidlaw into compliance. In other words, as a result of the suit, Laidlaw took the actions the suit was designed to effectuate. The fact that the relief plaintiffs obtained was vacated is irrelevant, since the vacation of the judgment occurred precisely because the suit had been successful in obtaining Laidlaw's compliance with the statute.

8. The decision of the court of appeals below is of devastating consequence to citizen suits under the Clean Water Act and other environmental statutes.

The determination that any suit must be dismissed as moot simply because no injunctive relief issued would allow defendants to win virtually any citizen suit by delaying the determination as to injunctive relief long enough to allow it to bring itself sufficiently into compliance so that irreparable injury to the plaintiffs could no longer be shown. As this case well illustrates, such issues as notice, standing, preclusion and numerous other possible defenses can be used to delay injunctive relief, even when violations are continuing to occur, because the plaintiff's success is not yet sufficiently clear to support an injunction. As this case also unfortunately illustrates, resolution of liability and relief in the district courts in Clean Water Act and other environmental cases often takes many years.[7/]

The decision of the court below will only encourage defendants to take every possible step to delay resolution of injunctive relief. The Court of Appeals for the Third Circuit has stated (*Natural Resources Defense Council, Inc. v. Texaco Refining and Manufacturing, Inc.*, *supra*, 2 F.3d at 503-504):

> A citizen suit would lose much of its effectiveness if a defendant could avoid

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7/Plaintiffs' counsel in this litigation has a similar case pending in the District Court for the District of New Jersey which was filed in May 1989, and which is awaiting decision concerning the civil penalty to be imposed after a trial in February 1997. *PIRG v. Hercules, Inc.*, D.N.J., Civil No. 89-2291.

> paying any penalties by post-complaint compliance. If penalty claims could be mooted, polluters would be encouraged to "delay litigation as long as possible, knowing that they will thereby escape liability even for post-complaint violations, so long as violations have ceased at the time the suit comes to trial." Moreover, whether or not damage claims are mooted would depend on the vagaries of when the district court happens to set the case for trial. We cannot embrace a rule that would weaken the deterrent effect of the Act by diminishing incentives for citizens to sue and encourage dilatory tactics by defendants. (footnotes and citations omitted)[8/]

Even more important, however, the decision of the court of appeals is almost certain to lead environmental groups to cease bringing citizen suits. It makes little sense for citizen groups to seek to enforce the Clean Water Act and other environmental laws when, after years of litigation, a company that has repeatedly violated the statute for a long period of time avoids any penalty for its violations. This case unfortunately illustrates the problem all too well. After six years of litigation, and, we emphasize, successful

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8/A recent decision of the District Court for the District of New Hampshire has recently gone even further by holding, in reliance on the decision of the court of appeals in the present case, that, even where injunctive relief has been granted, the mootness doctrine bars a citizen suit under the Clean Water Act for civil penalties once the violations have ceased because the injunction assures that violations are not likely to recur. *Dubois v. U.S. Dep't of Agriculture*, *supra*, * 12-14.

litigation which led the defendant to cease its violations and required it to pay a substantial penalty, the case has been dismissed without any penalty being imposed for Laidlaw's hundreds of violations.[9/]

The further determination of the court of appeals that, contrary to the law in other circuits, plaintiffs are not entitled to attorneys' fees, would virtually assure that few citizen suits will be brought. As again this case illustrates, enforcement suits under the Clean Water Act and other environmental statutes are major, complex litigation requiring substantial resources. The expert witness' fees of citizen-plaintiffs customarily are at least tens of thousands of dollars. The attorneys' fees would be hundreds of thousands of dollars or more if citizen-plaintiffs could compensate their attorneys. Since citizen-plaintiffs rarely have such resources, most citizen enforcement suits are brought on the basis of the attorneys being compensated solely by court awards if the suits are successful. Extremely few lawyers will be willing to bear large costs in the form of expert witness' fees and their own uncompensated time only to find that their suit has led the defendant to comply with the statute and therefore, for this very reason, the case must be dismissed without any award of attorneys' fees or expenses.

In passing the provision of the Clean Water Act providing for the payment of the attorneys' fees and expert

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9/Laidlaw did pay a penalty of $100,000 to the State. 890 F. Supp. at 479. The district court found that the state suit did not preclude this action largely because of the clear inadequacy of this penalty. 890 F. Supp. at 490-498. However, in the overwhelming majority of cases, no penalty will be paid if the case is dismissed as moot because the defendant has finally come into compliance.

witness fees of successful plaintiffs, Congress intended to induce attorneys to be willing to bring these cases. *Student Public Interest Research Group of New Jersey v. AT&T Bell Laboratories*, 842 F.2d 1436, 1448-1449 (3d Cir. 1988). Congress did this by providing for compensation at market rates so that attorneys handling these cases would be compensated, when the litigation was successful, to the same degree as when they did other legal work. *See ibid.* The decision of the Court below deeply undermines this inducement. It means that even when the litigation is fully successful, it will often result in no compensation to the plaintiff's attorneys. Such a result is not only obviously unfair but directly contrary to Congress' intent.

Finally, the decision of the court of appeals on the attorneys' fees issue will affect the willingness of lawyers to bring not only citizen suits under environmental statutes but suits under civil rights statutes and other statutes where Congress has provided for fee-shifting.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

Bruce J. Terris
Carolyn Smith Pravlik
Kathleen L. Millian

James S. Chandler, Jr.

Counsel for Petitioners

APPENDIX

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FRIENDS OF THE EARTH, INCORPORATED; CITIZENS LOCAL ENVIRONMENTAL ACTION NETWORK, INCORPORATED; SIERRA CLUB, *Plaintiffs-Appellees,*	)
v.	)
LAIDLAW ENVIRONMENTAL SERVICES (TOC), INCORPORATED, *Defendant-Appellant.*	)
SOUTH CAROLINA CHAMBER OF COMMERCE; ENVIRONMENTAL MANAGEMENT ASSOCIATION OF SOUTH CAROLINA; SOUTH CAROLINA MANUFACTURERS ALLIANCE; CALIFORNIA PUBLIC INTEREST RESEARCH GROUP; FLORIDA PUBLIC INTEREST RESEARCH GROUP; ILLINOIS PUBLIC INTEREST RESEARCH GROUP; MASSACHUSETTS PUBLIC INTEREST RESEARCH GROUP; PUBLIC INTEREST RESEARCH GROUP IN MICHIGAN; PUBLIC INTEREST RESEARCH GROUP OF NEW JERSEY; OHIO PUBLIC INTEREST RESEARCH GROUP; OREGON STATE PUBLIC INTEREST RESEARCH GROUP; WASHINGTON PUBLIC INTEREST RESEARCH GROUP; UNITED STATES OF AMERICA; SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL, *Amici Curiae.*	) No. 97-1246

FRIENDS OF THE EARTH, INCORPORATED; CITIZENS LOCAL ENVIRONMENTAL ACTION NETWORK, INCORPORATED; SIERRA CLUB,
Plaintiffs-Appellees,

v.

LAIDLAW ENVIRONMENTAL SERVICES (TOC), INCORPORATED,
Defendant-Appellant.

SOUTH CAROLINA CHAMBER OF COMMERCE; ENVIRONMENTAL MANAGEMENT ASSOCIATION OF SOUTH CAROLINA; SOUTH CAROLINA MANUFACTURERS ALLIANCE; CALIFORNIA PUBLIC INTEREST RESEARCH GROUP; FLORIDA PUBLIC INTEREST RESEARCH GROUP; ILLINOIS PUBLIC INTEREST RESEARCH GROUP; MASSACHUSETTS PUBLIC INTEREST RESEARCH GROUP; PUBLIC INTEREST RESEARCH GROUP IN MICHIGAN; PUBLIC INTEREST RESEARCH GROUP OF NEW JERSEY; OHIO PUBLIC INTEREST RESEARCH GROUP; OREGON STATE PUBLIC INTEREST RESEARCH GROUP; WASHINGTON PUBLIC INTEREST RESEARCH GROUP; UNITED STATES OF AMERICA; SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL,
Amici Curiae.

No. 97-1246

Appeals from the United States District Court
for the District of South Carolina at Columbia.
Joseph F. Anderson, Jr., District Judge.
(CA-92-1697-3-17)

Argued: March 5, 1998

Decided: July 16, 1998

Before WILKINS and HAMILTON, Circuit Judges, and BROADWATER, United States District Judge for the Northern District of West Virginia, sitting by designation.

Vacated and remanded by published opinion. Judge Wilkins wrote the opinion, in which Judge Hamilton and Judge Broadwater joined.

COUNSEL

ARGUED: Bruce J. Terris, TERRIS, PRAVLIK & WAGNER, Washington, D.C., for Appellants. Donald Alan Cockrill, OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C., Greenville, South Carolina, for Appellee. **ON BRIEF:** Carolyn Smith Pravlik, TERRIS, PRAVLIK & WAGNER, Washington, D.C.; James S. Chandler, Jr., SOUTH CAROLINA ENVIRONMENTAL LAW PROJECT, Pawleys Island, South Carolina, for Appellants. Kristofer K. Strasser, Jack D. Todd, OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C., Greenville, South Carolina for Appellee. Deborah Ann Hottel, MCNAIR LAW FIRM, P.A., Columbia, South Carolina; Thomas S. Mullikin, MULLIKIN LAW FIRM, Camden, South Carolina, for Amici Curiae Chamber of Commerce, et al. Charles C. Caldart, David A. Nicholas, NATIONAL ENVIRONMENTAL LAW CENTER, Boston, Massachusetts, for Amici Curiae California

Public Interest, et al. Lois J. Schiffer, Assistant Attorney General, James F. Simon, Deputy Assistant Attorney General, Martin W. Matzen, Thomas A. Mariani, Jr., Julie B. Kaplan, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; Susan Lepow, Associate General Counsel, Richard Witt, Office of General Counsel, David Drelich, Senior Attorney, Office of Enforcement and Compliance Assurance, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Washington, D.C., for Amicus Curiae United States. Carlisle Roberts, Jr., Samuel L. Finklea, III, William A. Ready, III, SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL, Columbia, South Carolina, for Amicus Curiae Department of Health.

OPINION

WILKINS, Circuit Judge:

Plaintiffs Friends of the Earth, Inc. (FOE), Citizens Local Environmental Action Network, Inc. (CLEAN), and Sierra Club appeal an order of the district court penalizing Laidlaw Environmental Services (*TOC), Inc. (Laidlaw) for violations of a National Pollutant Discharge Elimination System (NPDES) permit, arguing that the district court abused its discretion by imposing what Plaintiffs assert was an inadequate penalty. Laidlaw cross appeals, claiming, *inter alia*, that Plaintiffs lacked standing to institute this action because they suffered no injury in fact and that this suit should have been barred because the South Carolina Department of Health and Environmental Control (DHEC) diligently prosecuted a prior action regarding the same

violations, *see* 33 U.S.C.A. § 1365(b)(1)(B) (West 1986). We conclude that this action is now moot; accordingly, we vacate the order of the district court and remand with instructions to dismiss.

I.

Plaintiffs brought this enforcement action against Laidlaw[1] pursuant to the citizen-suit provision of the Federal Water Pollution Control Act, *see* 33 U.S.C.A. § 1365(a)(1) (West 1986 & Supp. 1998), alleging ongoing violations by Laidlaw of an NPDES permit and seeking imposition of monetary penalties as well as declaratory and injunctive relief and attorneys' fees and costs. After a seven-day hearing, the district court ruled that the prior suit by DHEC that Laidlaw alleged barred the current action had not been "diligently prosecuted" within the meaning of § 1365(b)(1)(B)[2] and therefore would not serve to bar present suit. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 890 F. Supp. 470, 498 (D.S.C. 1995). Following a bench trial, the district court found that Laidlaw had committed numerous permit violations and imposed a penalty of $405,800. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 956 F. Supp. 588, 600-01, 610 (D.S.C. 1997). However, because the court found that Laidlaw's violations

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[1]FOE and CLEAN initiated the suit, and Sierra Club subsequently joined as an additional plaintiff. *See* Fed. R. Civ. P. 21.

[2]Section 1365(b)(1)(B) provides that a citizen suit under the Federal Water Pollution Control Act may not be commenced when the "State has commenced and is diligently prosecuting a civil ... action in a court of the ... State to require compliance." 33 U.S.C.A. §1365(b)(1)(B).

had not harmed the environment and that Laidlaw had been in substantial compliance for several years at the time of the issuance of its final order, the court denied Plaintiffs' request for declaratory and injunctive relief. *See id.* at 611. In a separate order, the court stayed the time for a petition for attorney's fees until the time for appeal had expired or, if either party appealed, until the appeal was resolved. This appeal followed.

II.

The Constitution provides that "[t]he judicial Power" of the federal courts of the United States extends only to specified "Cases" and "Controversies." U.S. Const. art. III, § 2, cl. 1; *see In re Pruett*, 133 F.3d 275, 278 (4th Cir. 1997). "The doctrine of standing has always been an essential component of [the] case or controversy requirement of federal jurisdiction." *Marshall v. Meadows*, 105 F.3d 904, 906 (4th Cir. 1997). In order to have standing, a plaintiff must have suffered an actual or threatened injury in fact; the injury must have been caused by the defendant's complained-of conduct; and the injury must be redressable by the relief sought. *See Steel Co. v. Citizens for a Better Env't*, 118 S. Ct. 1003, 1016-17 (1998). Moreover, these elements must continue to exist at every stage of review, not merely at the time of the filing of the complaint. *See Arizonans for Official English v. Arizona*, 117 S. Ct. 1055, 1068 (1997); *Suarez Corp. Indus v. McGraw*, 125 F.3d 222, 228 (4th Cir. 1997). Otherwise, the action becomes moot. *See United States Parole Comm'n v. Geraghty*, 445 U.S. 338, 397 (1980) (explaining that mootness has been described as "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)" (internal quotation marks omitted)). The continued presence

of these elements ensures that the plaintiff has "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues." *Baker v. Carr*, 369 U.S. 186, 204 (1962).

Here, we focus on the continued existence of the third element, redressability.[3] Because Plaintiffs have not appealed the denial of declaratory and injunctive relief, the only potential relief that may be available to redress their claimed injuries is the civil penalty imposed upon Laidlaw, which would be paid to the United States Treasury. *See Atlantic States Legal Found., Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1131 n.5 (11th Cir. 1990). Such penalties, however, cannot redress any injury suffered by a citizen plaintiff. *See Steel Co.*, 118 S. Ct. at 1018-19.

In *Steel Co.*, the Supreme Court held that a plaintiff lacked standing to prosecute a private enforcement action under the

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[3]Laidlaw claims that Plaintiffs were never injured by its permit violations because the violations caused no harm to the environment. Laidlaw also asserts that even if Plaintiffs had been injured by the violations in the past, they no longer have any stake in prosecuting this action because Laidlaw has been in compliance with its permit for several years. For purposes of this appeal, we assume without deciding that Plaintiffs had standing to initiate this action and have proven a continuous injury in fact. *See Arizonans for Official English*, 117 S. Ct. at 1068 (deciding the case on the basis of mootness without first determining whether appellants had "standing to appeal because the former question, like the latter, goes to the Article III jurisdiction of this Court and the courts below, not to the merits of the case").

citizen-suit provision of the Emergency Planning and Community Right-To-Know Act of 1986, *see* 42 U.S.C.A. § 11046(a)(1) (West 1995), because the relief requested could not redress the injury plaintiff had allegedly suffered. *See Steel Co.*, 118 S. Ct. at 1017-20. In particular, the Court noted that any civil penalties imposed would be payable to the United States Treasury and not to the plaintiff and therefore that the penalties would not benefit the plaintiff. *See id.* at 1018-19. The Court reasoned that

> although a suitor may derive great comfort and joy from the fact that the United States Treasury is not cheated, that a wrongdoer get his just deserts, or that the nation's laws are faithfully enforced, that psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury.

Id. at 1019.[4] Applying the reasoning of *Steel Co.*, we conclude that this action is moot because the only remedy

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[4]Prior to *Steel Co.*, which was decided after the district court rendered its decision in the case at bar, this court had held that because "penalties can be an important deterren[t] against future violation," they could redress a private plaintiff's injury from violations even though the penalties are not paid to the plaintiff. *Sierra Club v. Simkins Indus., Inc.*, 847 F.2d 1109, 1113 (4th Cir. 1988). Because *Steel Co.*, constitutes "a superseding contrary decision of the Supreme Court," we are required to follow it. *Hoffman v. Hunt*, 126 F.3d 575, 584 (4th Cir. 1997) (internal quotation marks omitted), *cert. denied*, 66 U.S.L.W. ___ (U.S. May 26, 1998) (No. 97-1322).

currently available to Plaintiffs--civil penalties payable to the government--would not redress any injury Plaintiffs have suffered. We therefore vacate the order of the district court and remand with instructions to dismiss this action.[5] *See Arizonans for Official English*, 117 S. Ct. at 1071.

VACATED AND REMANDED

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[5]Plaintiffs' failure to obtain relief on the merits of their claims precludes any recovery of attorneys' fees or other litigation costs because such an award is available only to a "prevailing or substantially prevailing party." 33 U.S.C.A. §1365(d) (West Supp. 1998); *cf. Farrar v. Hobby*, 506 U.S. 103, 111 (1992) (explaining that "to qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim"); *S-1 & S-2 v. State Bd. of Educ.*, 21 F.3d 49, 51 (4th Cir. 1994) (en banc) (per curiam) (adopting the dissenting opinion reported at 6 F.3d 160, 168-72 (4th Cir. 1993), wherein Judge Wilkinson concluded that *Farrar* dictates that civil rights plaintiffs who obtained a judgment against a defendant that was subsequently vacated by this court on mootness grounds were not "prevailing part[ies]" entitled to an award of litigation costs). *But see Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 67 n.6 (1987) (citing 1971 legislative history for the proposition that an award of litigation costs could be allowed under §1365(d) when a case becomes moot because the defendant violator voluntarily came into compliance with the law, but not discussing the 1987 amendment to §1365(d) requiring a plaintiff to be a "prevailing or substantially prevailing party" to receive an award of litigation costs).

STATUTES INVOLVED

The following are the relevant statutory provisions of the

Federal Water Pollution Control Act:

33 U.S.C. 1365:

§ 1365. Citizen suits

(a) **Authorization; jurisdiction**
Except as provided in subsection (b) of this section and section 1319(g)(6) of this title, any citizen may commence a civil action on his own behalf--

(1) against any person including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, * * *.

* * *

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

(d) Litigation Costs.
The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation

(including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate. * * *

(g)"Citizen" defined.

For the purposes of this section the term "citizen" means a person or persons having an interest which is or may be adversely affected.

33 U.S.C. 1319(D):

(d) Civil penalties; factors considered in determining amount.

Any person who violates section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator, or by a State, or in a permit issued under section 1344 of this title by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title, and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty or the violator, and such other matters as justice may require. * * *

Nos. 97-1246 and 97-1261

IN THE UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

Friends of the Earth, Inc., Citizens Local Environmental Action Network, Inc., and Sierra Club

Plaintiffs-Appellants,

v.

Laidlaw Environmental Services (TOC), Inc.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA, COLUMBIA DIVISION

SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA, COLUMBIA DIVISION

SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS

STATEMENT OF ISSUES

I. Whether a defendant's post-complaint compliance with a Clean Water Act discharge permit deprives a citizen plaintiff of standing to enforce violations that were ongoing when the plaintiff filed the complaint?

II. Whether, in an action to enforce a Clean Water Act discharge permit, the expiration of that permit and the issuance of a new permit necessarily moots the citizen plaintiff's claim?

INTEREST OF THE UNITED STATES

The United States, with the states, implements and has the lead role in enforcing the Clean Water Act ("Act" or "CWA"), 33 U.S.C. § 1251 et seq. Congress also has authorized affected persons to enforce many of the Act's requirements. Such "citizen suits" allow persons who are or may be injured by violations to protect their health, environmental, and other interests, and encourage compliance with the Act. Because resource limitations do not allow the government to pursue all violations that warrant enforcement, the United States has a strong interest in ensuring that citizens may enforce the Act to the full extent intended by Congress and allowed by the Constitution.

SUMMARY OF ARGUMENT

The recent decision in Steel Company v. Citizens for A Better Environment, 118 S. Ct. 1003 (1998), does not undermine standing in this case. A defendant's post-complaint compliance with the law cannot deprive a citizen

plaintiff of standing, because under a long line of unquestioned precedent, standing depends upon the facts that existed when the complaint was filed. While a case or controversy must exist at all stages in the litigation, courts evaluate post-complaint changes in fact and law through the mootness doctrine, rather than by revisiting standing.

The United States takes no position on whether the particular facts of this case render the controversy moot, but notes that, as a rule, voluntary, post-complaint cessation of illegal activity does not render a claim moot unless the defendant carries its "heavy burden" of proving that the post-complaint change makes "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., 484 U.S. 49, 66 (1987) (quoting United States v. Concentrated Phosphate Export Ass'n, 393 U.S. 199, 203 (1968)). One factor a court should consider in deciding whether the defendant has met that burden is whether the defendant would have a financial incentive to resume its illegal conduct. The mere fact that the district court decided not to issue an injunction does not demonstrate that this case is moot. Both injunctive relief and civil penalties may redress the prospect of future violations through specific deterrence. Thus, prayers for both types of relief may support Article III jurisdiction, even where a court denies one or both forms of relief on the merits.

ARGUMENT

I. Laidlaw's Post-Complaint Compliance Is Not Relevant to FOE's Standing, Because Standing Is Evaluated Based on the Facts at the Time of the Complaint.

A. Standing Turns on the Facts as They Existed at the of Time the Complaint, While Post-Complaint Factual Developments Go to Mootness.

Article III limits the judicial power of federal courts to "cases" or "controversies." This requirement serves to "limit the business of the federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process" and also "to assure that the federal courts will not intrude into areas committed to other branches of government." Flast v. Cohen, 392 U.S. 83, 95 (1968). One aspect of the case-or-controversy requirement is the doctrine of standing, under which a plaintiff seeking to invoke the jurisdiction of a federal court must show either a present or threatened future "injury in fact" that is "causal[ly] connect[ed]" to the challenged conduct and that "likely" would be redressed by a favorable decision. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (emphasis omitted).

The facts that must be alleged, supported, and ultimately proven to support standing are the facts as they existed at the time the plaintiff filed its complaint and sought to trigger the court's jurisdiction. See, e.g., Lujan., 504 U.S. at 569 n.4; County of Riverside v. McLaughlin, 500 U.S. 44, 50-51 (1991); Gwaltney of Smithfield v. Chesapeake Bay

Found., 484 U.S. 49, 69 (1987) (Scalia, J., concurring in part and in the judgement); cf. Allen v. Wright, 468 U.S. 737, 751-52 (1984) ("In most cases the standing question can be answered chiefly by comparing the allegations of the particular complaint to those made in prior standing cases." (emphasis added)); O'Shea v. Littleton, 414 U.S. 488, 496 (1974) (holding that plaintiffs lacked standing where "[n]either the complaint nor respondents' counsel suggested that any of the named plaintiffs at the time the complaint was filed were themselves serving an allegedly illegal sentence or were on trial or awaiting trial before petitioners." (emphasis added)); Smith v. Sperling, 354 U.S. 91, 93 n. 1 (1957); St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 289-90 (1938).

The Article III case-or-controversy requirement subsists "through all stages of federal judicial proceedings," Lewis v. Continental Bank Corp., 494 U.S. 472, 477, 478 (1990) (internal quote marks omitted), but post-complaint changes in the facts or law that may eliminate any "case" or "controversy" are uniformly assessed through the lens of mootness rather than standing. See, generally Los Angeles County v. Davis, 440 U.S. 625, 631 (1979) ("[J]urisdiction, properly acquired, may abate if the case becomes moot *** ." (internal quote marks and citations omitted)); Carr v. Alta Verde Industries, Inc., 931 F.2d 1055, 1061 (5th Cir. 1991); 13A C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure ¶3533, at 211 (2d ed. 1984). The cases that evaluate post-complaint developments under the mootness rubric are numerous and unquestioned. See, e.g., Spencer v. Kemna, 118 S. Ct. 978, 983 (1998). For example, in County of Riverside v. McLaughlin, 500 U.S. 44, 50-52 (1991), the Court held that the plaintiff had standing even though, as a result of post-complaint developments, the case was moot.

Likewise, in Arizonans for Official English v. Arizona, 117 S. Ct. 1055 (1997), a state employee sued the state to challenge a state law that she believed required her to speak English at work. While the case was on appeal, the plaintiff left state employment, and the Supreme Court determined that her challenge was "moot." Id. at 1068-69.[1] And in Gwaltney, after addressing standing, the Supreme Court invoked the mootness doctrine as the right tool for resolving the defendant's concern that citizens should not "press their suit to conclusion" where the "allegations of ongoing noncompliance become false at some later point in the litigation." 484 U.S. at 66-67.

Mootness and standing have common origins and related contours. Allen v. Wright, 468 U.S. 737, 750, 104 S. Ct. 3315, 3324 (1984). The Supreme Court has on occasion described mootness "'as the doctrine of standing set in a time

frame.'" Arizonans for Official English, 117 S. Ct. at 1068-69 (quoting United States Parole Comm'n v. Geraghty, 445 U.S. 388, 397 (1980)).[1] But while the contours of these two doctrines sometimes overlap, the Supreme Court has consistently inquired whether post-complaint changes deprive the court of jurisdiction through the "mootness," not the "standing," lens. Steel Company specifically recognized and implicitly reaffirmed this distinction, in holding that an exception to the mootness doctrine did not apply to the standing inquiry. See 118 S. Ct. at 1020; see also Burke v. Barnes, 479 U.S. 361, 364 n.*, 107 S. Ct. 734, 736 n.* (1987) ("We reject respondents' argument that the questions of mootness and standing are necessarily intertwined.").

B. Laidlaw's Post-Complaint Compliance Is Irrelevant to FOE's Standing.

FOE did not "lose standing" once Laidlaw came into compliance with the company's 1986 permit. As discussed supra, a plaintiff's standing depends on the facts that existed when the plaintiff filed its complaint. FOE filed its complaint on June 12, 1992, and joined Sierra Club as a plaintiff on November 19, 1992. 956 F. Supp. at 592. Laidlaw violated its permit limits for mercury fourteen times in June 1992, including on the very day the complaint was filed and on several subsequent days during that month, and

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1 The Supreme Court sometimes even has incorporated the tripartite standing test into the mootness inquiry. See, e.g., Spencer v. Kemna, 118 S. Ct. 978, 983 (1998) (Scalia, J.). Compare United States Parole Comm'n v. Geraghty, 445 U.S. 388, 403 (1980) (using a test specific to the mootness inquiry).

violated its mercury limit on at least six more days in the following four months. Id. at 621. Laidlaw substantially reduced its violations shortly after FOE sued, see id. at 611, but did not consistently comply with its permit limit for mercury discharges until 1995. Ibid. Thus, Laidlaw did not "come into compliance with the 1986 permit" until after FOE sued, and Laidlaw's post-complaint compliance is inapposite to FOE's standing. Put another way, if FOE had standing on the facts as they existed when FOE filed its complaint, no subsequent change in the facts — not even Laidlaw's post-complaint compliance — could eliminate that standing. The Steel Company Court's recognition of the difference between mootness and standing, see 118 S. Ct. at 1020, buttresses this conclusion.

II. The Issuance of the 1993 and 1994 Permits Did Not Necessarily Moot This Case.

A. A Defendant's Voluntary, Post-Complaint Cessation of Illegal Activity Does Not Moot a Case Unless the Defendant Proves That the Wrongful Behavior Could Not Reasonably Be Expected to Recur.

1. The Defendant Carries the Burden of Demonstrating that Post-Complaint Compliance Moots a Plaintiff's Suit.

A case becomes moot "'when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.'" United States Parole Commission v. Geraghty, 445 U.S. 388, 395-96 (1980) (quoting Powell v. McCormack, 395 U.S. 486, 496 (1969)). The mootness doctrine, like that of standing, derives from the Article III

case-or-controversy requirement, but the two are not the same:

> [W]hile the initial burden of establishing the trial court's jurisdiction rests on the party invoking that jurisdiction, once that burden has been met courts are entitled to presume, absent further information, that jurisdiction continues. If a party to an appeal suggests that the controversy has, since the rendering of judgment below, become moot, that party bears the burden of coming forward with the subsequent events that have produced that alleged result.

Cardinal Chemical Co. v. Morton Int'l., Inc., 508 U.S. 83, 98 (1993).

In keeping with this shifted burden, the Supreme Court long has recognized that a defendant who voluntarily halts challenged conduct only after being sued generally does not thereby "deprive the tribunal of power to hear and determine the case." United States v. W. T. Grant Co., 345 U.S. 629, 632 (1953); accord City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 289 (1982); United States v. Concentrated Phosphate Export Ass'n, 393 U.S. 199, 203 (1968). Rather, a defendant who seeks to moot a lawsuit by voluntarily halting challenged activity only after being sued must carry the "heavy burden" of showing "that it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." Gwaltney, 484 U.S. at 66 (emphasis in original; internal quote marks omitted); accord, e.g., Chesapeake Bay Foundation, Inc. v. Gwaltney of Smithfield, Ltd., 890 F.2d 690, 697 (4th Cir. 1989); American Iron & Steel Inst. v. Environmental Protection Agency, 115 F.3d 979, 1007 (D.C. Cir. 1997). This rule

"protects plaintiffs from defendants who seek to evade sanction by predictable protestations of repentance and a reform," Gwaltney, 484 U.S. at 67, while promoting judicial economy and fairness. As the Third Circuit has explained:

> A citizen suit would lose much of its effectiveness if a defendant could avoid paying any penalties by post-complaint compliance. *** [P]olluters would be encouraged to delay litigation as long as possible, knowing that they will thereby escape liability even for post-complaint violations, so long as violations have ceased at the time the suit comes to trial. Moreover, whether or not damage claims are mooted would depend on the vagaries of when the district court happens to set the case for trial.

Natural Resource Defense Council v. Texaco Ref. & Mktg., Inc., 2 F.3d 493, 503 (3d Cir. 1993) (citations and quotations omitted).

Steel Company supports application of the "voluntary cessation" mootness rule to this case. The Steel Company Court declined to extend the "voluntary cessation" rule to support a claim of standing where the plaintiff did not allege any likelihood of future violations. See 118 S. Ct. at 1020. But Steel Company preserved without questioning the long-standing application of the voluntary cessation rule "to refute the assertion of mootness by a defendant who, when sued in a complaint that alleges present or threatened injury, ceases the complained-of activity." Ibid. This is such a case.

The question whether Laidlaw's present compliance moots any controversy with respect to future violations turns on two subsidiary questions: First, is Laidlaw's post

-complaint compliance attributable solely to a permanent change in the law (i.e., the change in Laidlaw's 1994 permit), or did Laidlaw's post-complaint compliance result at least in part from Laidlaw's "voluntary cessation" of illegal activity after FOE sued? If "voluntary cessation" was a factor, then the voluntary cessation doctrine applies. The United States leaves that fact-specific inquiry to the parties. Second, if Laidlaw's compliance was attributable at least in part to Laidlaw's "voluntary cessation" of illegal activity, has Laidlaw proved that its violations cannot reasonably be expected to recur? If Laidlaw has not carried that burden, this case remains "live."

2. Mere "Protestations of Repentance and Reform" Do Not Demonstrate That A Controversy Is Moot.

In evaluating whether a defendant has carried its heavy burden of demonstrating that violations cannot reasonably be expected to recur, one factor a court should consider is whether the defendant would have an incentive to resume its illegal activity — especially any economic incentive like one the defendant may have had immediately before the complaint — if the case (and the accompanying imminent threat of sanctions) were dismissed. Cf. Concentrated Phosphate Export Ass'n, 393 U.S. at 202-03 (holding that the defendants' mere assertion that the prior illegal practice was no longer economical did not suffice to moot an enforcement action). Where a defendant has a direct financial incentive to resume conduct that is illegal, cessation of illegal activity — even if accompanied by a substantial period of compliance during the lawsuit — is unlikely to be sufficient to make "absolutely clear" that there is "no reasonable expectation that the wrong will be repeated." See Gwaltney, 484 U.S. at 66-67; see also W.T. Grant Co., 345

U.S. at 632-33; cf. Gwaltney, 484 U.S. at 69 (Scalia, J., concurring in part and in the judgement) ("A good or lucky day is not a state of compliance. Nor is the dubious state in which a past effluent problem is not recurring at the moment but the cause of that problem has not been completely and clearly eradicated.").

3. The Denial of An Injunction Is Not Equivalent to A Factual Finding that the Controversy Is Moot.

The district court's decision not to enjoin Laidlaw does not necessarily mean that Laidlaw had carried its burden of proving mootness. The district court correctly recognized that "a defendant in substantial compliance with its NPDES permit is not required to show that there is no chance of future permit violations in order to defeat a request for injunctive relief." 956 F. Supp. at 611. Abandonment of illegal activity "is an important factor bearing on the question whether a court should exercise its power to enjoin the defendant from renewing the practice, but that is a matter relating to the exercise rather than the existence of judicial power." City of Mesquite, 455 U.S. at 289. Thus, even in cases in which a court determines that an injunction is inappropriate, claims regarding future violations generally are not mooted by a defendant's "voluntary cessation" of illegal activity. See Concentrated Phosphate Export Ass'n, 393 U.S. at 203; W.T. Grant Co., 345 U.S. at 633-34, 635-36 ("We conclude that, although the actions were not moot, no abuse of discretion has been demonstrated in the trial court's refusal to award injunctive relief."); see also Illinois Central R.R. Co. v. Adams, 180 U.S. 28, 30-32 (1901) (reasoning that the court had jurisdiction, despite the respondent's argument that

"the very things the bill was filed to prevent are accomplished facts, and the [petitioner] cannot be injured," because those "accomplished facts" went to the merits rather than to jurisdiction). Steel Company reaffirmed that Article III redressability turns on the relief the plaintiff requests — unless the request is wholly frivolous — even if the court ultimately dismisses the case on the merits. 118 S. Ct. at 1010; see also Bell v. Hood, 327 U.S. 678, 682-83 (1946); Binderup v. Pathe Exchange, Inc., 263 U.S. 291, 305-06 (1923).

B. Both An Injunction Against Future Violations And An Award of Civil Penalties May Redress Injuries From Threatened Future Violations.

Both injunctions and civil penalties deter threatened future violations by a defendant, and thereby redress injuries from those threatened future violations. The Steel Company Court recently reiterated that the deterrent effect of an order regarding future compliance satisfies the Article III standing requirement for redressability where the plaintiff alleges a continuing violation or the imminence of a future violation. Steel Co., 118 S. Ct. at 1019. Thus, if FOE has an injury from the threat of Laidlaw's future violations, that injury would be redressed by an injunction against Laidlaw.

Civil penalties also would redress injuries from threatened future violations, by deterring those future violations. As the Supreme Court has noted, injunctions are not the only means of obtaining compliance with the Clean Water Act — penalties also can specifically deter future violations by a defendant. Weinberger v. Romero-Barcelo, 456 U.S. 305, 314 (1982); see also Tull v. United States, 481 U.S. 412, 422-23 (1987) (citing 123 Cong. Rec. 39191

(1977)) ("Congress wanted the district court to consider the need for retribution and deterrence, in addition to restitution, when it imposed civil penalties [under the Clean Water Act]."). It was for this reasons that Congress empowered district courts to "seek to deter future violations by basing the penalty on its economic impact." Tull, 481 U.S. at 423.

Relying on language in Steel Company, Laidlaw argues that civil penalties cannot redress a citizen's injuries because penalties are paid to the Treasury and any deterrent effect is not cognizable under Article III. See Laidlaw's 2d Supp. Br. 4. Laidlaw's argument misreads Steel Company, which stated that the plaintiff's prayer for penalties, in a complaint that did not allege future violations, "seeks not remediation of [plaintiff's] own injury *** but vindication of the rule of law — the 'undifferentiated public interest' in faithful execution of EPCRA." 118 S. Ct. at 1018.

> This does not suffice. Justice Stevens thinks it is enough that respondents will be gratified by seeing petitioner punished for its infractions and that the punishment will deter the risk of future harm. * * * [S]uch a principle would make the redressability requirement vanish. By the mere bringing of the suit, every plaintiff demonstrates his belief that a favorable judgment will make him happier. But although a suitor may derive great comfort and joy from the fact that the United States Treasury is not cheated, that a wrongdoer gets his just deserts, or that the nation's laws are faithfully enforced, that psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury.

118 S. Ct. at 1018-19.

This language must be read in light of Steel Company's facts and other aspects of the opinion. The Supreme Court explicitly decided Steel Company on the basis that the plaintiff had not alleged a threat of future violations. Id. at 1019, 1020. It was obvious that penalties could not deter continuing or future violations by the defendant: There were no continuing or future violations by the defendant to deter. On those facts, the only deterrent effect that penalties could have had would have been to deter violations by the population at large — speculative violations by unknown, unrelated persons who might never cause the plaintiffs any injury. Consistent with longstanding principles of standing, the Steel Company Court rejected the notion that such an indistinct possibility satisfies the standing doctrine's injury-in-fact requirement, reasoning that the "great comfort" that a plaintiff may receive from knowing "the nation's laws are faithfully enforced" simply "is not an acceptable Article III injury." Id. at 1019.

The fact that Article III is not satisfied by the chance that penalties may generally deter speculative violations that have not even been alleged cannot be read as a rejection of the concept that specific deterrence provides cognizable redress for a plaintiff's injury from continuing or future violations by the defendant. Steel Company specifically reaffirmed that, "[i]f respondent had alleged a continuing violation or the imminence of a future violation," then judicial relief designed to deter a future violation "would remedy that alleged harm." 118 S. Ct. at 1019 . While the Court made this statement in discussing injunctive relief, the Court has always recognized that penalties and the threat of penalties, including Clean Water Act penalties, specifically deter misconduct by persons who are, or may be, penalized. See, e.g., Tull, 481 U.S. at 423; Romero-Barcelo, 456 U.S. at 314 ("An injunction is not the only means of ensuring

compliance. The [Clean Water Act] itself, for example, provides for fines and criminal penalties."); accord Texaco Refining, 2 F.3d at 503 n. 9 ("Citizens file actions primarily to deter future violations by the named defendant and by other potential polluters, and the imposition of penalties significantly enhances the deterrent effect of a citizen suit."). If violators "faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality." Albemarle Paper Co. v. Moody, 422 U.S. 405, 417 (1975). That is because the deterrent effect of even injunctions depends partly on the penalties that may give those injunctions teeth.[2] Penalties specifically deter future illegal activity by a defendant, and under Steel Company's reasoning, specific deterrence may redress injuries caused by the threat of a defendant's future violations.[3] Steel Company's holding — that some possible general deterrent effect on the world at large does not cognizably redress injuries from past violations — does not implicitly overrule the established law that penalties do specifically deter, or Steel Company's clear statement that specific deterrence is

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2 Similarly, declaratory relief would specifically deter future violations. A declaration that Laidlaw had violated the Clean Water Act could subject it to increased penalties if it committed violations again. 33 U.S.C. § 1319(d).

3 Indeed, this case seems to illustrate that principle: Laidlaw did not come into compliance until faced with the concrete prospect of penalties from the state and citizen enforcement actions.

adequate Article III redress for continuing or threatened future violations.[4]

CONCLUSION

A defendant's post-complaint compliance does not deprive a citizen plaintiff of standing, because standing depends upon the facts as they were when the complaint was filed. Post-complaint voluntary cessation of illegal activity moots a citizen plaintiff's claims for prospective relief only where the defendant carries the heavy burden of proving that the change makes absolutely clear that the wrongful behavior could not reasonably be expected to recur.

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4 Five courts of appeals have unanimously rejected the argument that post-complaint compliance strips a federal court of jurisdiction to hear a Clean Water Act plaintiff's claims for civil penalties for violations that were continuing at the time the plaintiff filed suit. See Comfort Lake Assoc., Inc. v. Dresel Contracting, Inc., 138 F.3d 351, 356 (8th Cir. 1998); Atlantic States Legal Found. v. Stroh Die Casting Co., 116 F.3d 814, 820 (7th Cir. 1997); Natural Resource Defense Council v. Texaco Ref. & Mktg., Inc., 2 F.3d 493, 503-04 (3rd Cir. 1993); Atlantic States Legal Found. v. Tyson Foods, Inc., 897 F.2d 1128, 1135 (11th Cir. 1990); Pawtuxet Cove Marina, Inc. v. Ciba-Geigy, Corp., 807 F.2d 1089, 1091 (1st Cir. 1986); see also Molokai Chamber of Commerce v. Kukui (Molokai), Inc., 891 F. Supp. 1389, 1406 (D. Hawaii 1995); Save Our Bays & Beaches v. City and County of Honolulu, 904 F. Supp. 1098, 1119 (D. Haw. 1994).

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90-12-098
JUNE 1998

No. 86-473

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

GWALTNEY OF SMITHFIELD, LTD.,
Petitioner,

v.

CHESAPEAKE BAY FOUNDATION, INC.,
and
NATURAL RESOURCES DEFENSE COUNCIL,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONER

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* * *

Permitting Citizen Suits For Purely Past Violations Would Contravene The Constitution

1. We agree with the Solicitor General that if the citizen suit provision were interpreted to permit citizen penalty actions for wholly past violations, it would violate the constitutional standing requirements of Article III. Gov. Br. 21-22 n.34. To satisfy Article III, a plaintiff must show not only an injury to himself but also that the injury "is likely to be redressed by a favorable decision." *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38 (1976). Even if a citizen plaintiff can show that he was injured by past

violations, penalties payable only to the Treasury cannot redress those injuries to that plaintiff.

"'The necessity that the plaintiff who seeks to invoke judicial power stand to profit in some personal interest remains an Art. III requirement.'"[21] Because respondents sued on the basis of purely past violations, App. 7a, 17a, they could not and did ont obtain the injunction they sought barring future violations. App. 83a. Damages are never recoverable under the Act. *Middlesex County*, 453 U.S. at 18, 21. The redressability requirement of Article III cannot be satisfied by any interest in general deterrence or law enforcement, no matter how keenly held, *Diamond v. Charles*, 106 S.Ct. 1697, 1706 (1986), nor by recovery of attorney's fees and costs.[22] While it would appear that penalties payable to the Treasury can *never* redress injury to citizen plaintiffs, it is certain that at least in the case of "citizen suits like the one at bar, seeking civil penalties for permit violations committed entirely in the past," App. 17a, the plaintiff does not and cannot "stand to profit in some personal interest" sufficient to satisfy Article III. *Allen v. Wright*, 468 U.S. at 766.

We also agree with the Solicitor General that permitting citizens to seek penalties for purely past violations would intrude upon the Executive's responsibility to "take Care that the Laws be faithfully executed," U.S. Const. Art. II § 3.

21*Allen v. Wright*, 468 U.S. 737, 766 (1984) (quoting *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. at 39).

22*Id.* at 1708; *White v. New Hampshire Dept. of Employment Security*, 455 U.S. 455, 452 (1982).

Gov. Br. 21-22 n. 34[23] Such an interpretation would allow any unaccountable citizen to engage in the essentially prosecutorial function of punishing permit holders for past violations. *See Tull v. United States*, 107 S.Ct. 1831, 1838 (1987).

2. Respondents do not even address these concerns, arguing that the constitutional issues are not before the Court.[24] Interpreting the statute as urged by Gwaltney would indeed avoid the necessity of reaching the constitutional issues in this case. The Court would simply hold that Gwaltney's motion to dismiss should have been granted, because the citizen plaintiffs sought penalties that the statute did not authorize. If the Court accepts respondents' view of the statute, however, it must address and resolve the constitutional arguments. Questions of Article III standing can never be waived, and this Court has an obligation to satisfy itself that the requirements of Article III have been met in every case before it.[25]

23*See* Brief of Amici Curiae Bethlehem Steel Corporation, et al.; Brief of Amicus Curiae Rollins Environmental Services (NJ) Inc.

24Resp. Br. 9 n.4. Respondents do include a cursory citation to United States ex rel. Marcus v. Hess, 317 U.S. 537 (1943), as the "full answer" to the constitutional concerns. That case is wholly beside the point, since the statute at issue there granted the citizen plaintiff half of any damages recovered. *See id. at 540.* Damages are not recoverable in citizen suits under the Clean Water Act, and all penalties go to the Treasury.

25"'This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it.'" *Bender v. Williamsport Area School Dist.*, 106 S. Ct. 1326, 1334 (1986) (quoting *Mansfield C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382 (1884)).

3. The Government recognizes that an ongoing violation is an Article III predicate to a constitutional citizen suit, but then suggests that Article III redressability concerns are satisfied when the citizen plaintiff *alleges* that he is adversely affected by an ongoing violation--even if the allegation turns out to be untrue. Gov. Br. 21 n.34. This Court, however, has repeatedly stressed that mere allegations are insufficient to meet the requirements of Article III.[26] The *facts* establishing an Article III case or controversy "must affirmatively appear in the record," and "it is not 'sufficient that jurisdiction may be inferred argumentatively from averments in the pleadings.'"[27]Here it is "undisputed" that Gwaltney's violations ceased before suit. App. 7a. Any allegations to the contrary cannot be relied upon to satisfy the redressability requirement of Article III.

Over the long run, even the Government finds its theory untenable. As the Government puts it, jurisdiction acquired on the basis of allegations may "abate," and the cessation of violations may render a case "nonjusticiable." Gov. Br. 27-28. These principles, the Government notes, "embrace core Article III concerns." *Id.* at 28. If the absence of an *ongoing* violation has constitutional significance at a *later* point in the litigation, however, it must have the same significance at the

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26*See, e.g., Warth v. Seldin*, 422 U.S. 490, 502 (1975) (plaintiffs "must allege *and show* that they personally have been injured")(emphasis supplied); *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 689 (1973) (standing allegations "must be true and capable of proof at trial"); *Los Angeles v. Lyons*, 461 U.S. 95, 107 n.8 (1983) ("It is the *reality* of the threat of repeated injury that is relevant to the standing inquiry, not the plaintiff's subjective apprehensions") (emphasis in original).

27*Bender v. Williamsport Area School Dist.*, 106 S.Ct. at 1334 (quoting *Grace v. American Central Ins. Co.*, 109 U.S. 278, 284 (1983)).

outset of the litigation. The Government simply attempts to transform the plaintiff's burden of establishing an *ongoing* violation, and thereby jurisdiction, into a burden on the defendant to prove the absence of an ongoing violation and the lack of jurisdiction. If one thing is clear, however, it is that since it is the plaintiff who "is seeking relief subject to [the court's] supervision, it follows that he must carry throughout the litigation the burden of showing that he is properly in court." *McNutt v. General Motors Acceptance Corp.*, 298 U.S. at 189. Respondents failed to meet that burden.

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

FRIENDS OF THE EARTH, et al.,
Petitioners,

v.

LAIDLAW ENVIRONMENTAL SERVICES (TOC), INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Friends of the Earth, Inc.; Citizens Local Environmental Action Network, Inc.; and Sierra Club,

Plaintiffs, **JUDGMENT**

v. C/A No. 3:92-1697-17

Laidlaw Environmental Services (TOC), Inc.

Defendant.

This action came to trial without a jury before the court, the Honorable Joseph F. Anderson, Jr., District Judge, presiding. The issues having been duly heard, and the court's Findings of Facts and Conclusions of Law having been duly rendered by order filed January 22, 1997,

IT IS ORDERED AND ADJUDGED that this court has jurisdiction over the defendant Laidlaw Environmental Services (TOC), Inc.'s violations of the mercury discharge limitation and the violations of the monitoring and reporting requirements of its NPDES permit, and the Clean Water Act 33 USC § 1365.

IT IS FURTHER ORDERED AND ADJUDGED that the defendant, Laidlaw Environmental Services (TOC), Inc. is assessed a civil penalty in the amount of Four Hundred

Five Thousand and Eight Hundred and no/100 ($405,800.00) Dollars. Post judgment interest shall accrue at the rate of 5.61%.

Further, the court having duly heard and granted in part on June 27, 1995, defendant Laidlaw Environmental Services (TOC), Inc.'s motion for summary judgment,

IT IS ORDERED AND ADJUDGED that partial summary judgment is entered for the defendant Laidlaw Environmental Services (TOC), Inc. as to the plaintiff's allegations of effluent discharge violations other than mercury.

LARRY W. PROPES, CLERK

January 22, 1997
Columbia, South Carolina By:_____
Gail Hayden, Deputy Clerk

SO APPROVED:

_____
Joseph F. Anderson, Jr.
United States District Judge

JAN 15 1999

No. 98-822

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

FRIENDS OF THE EARTH, *et al.*,

Petitioners,

vs.

LAIDLAW ENVIRONMENTAL SERVICES (TOC), INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether private plaintiffs' action became moot on appeal, due to redressability, where the only potential relief available was civil penalties payable to the U.S. Treasury.

2. Whether private plaintiffs are entitled to recovery of attorneys' fees or other litigation costs when they are not the prevailing or substantially prevailing party.

STATEMENT PURSUANT TO RULE 29.6

Laidlaw Environmental Services (TOC), Inc. is a wholly-owned subsidiary of Laidlaw Environmental Services, Inc. which is a publicly traded and held corporation. Laidlaw Environmental Services, Inc. is now known as Safety-Kleen Corp., and Laidlaw Environmental Services (TOC), Inc. is now known as Safety-Kleen (Roebuck), Inc. Neither Safety-Kleen Corp. nor Safety-Kleen (Roebuck), Inc. has any nonwholly owned subsidiaries.

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OPINIONS BELOW AND JURISDICTION

The petition accurately sets out the opinions below and the grounds for jurisdiction. Laidlaw adds that on November 18, 1998, the petition was placed on the docket and on December 10, 1998 Laidlaw was granted an extension of time to file its brief in opposition to the petition.

STATEMENT OF THE CASE

Laidlaw is a South Carolina corporation which owns and operated a hazardous waste incinerator in Roebuck, South Carolina.[1] Joint Appendix (hereinafter "JA") p. 118. As part of this facility, Laidlaw operated a wastewater treatment plant that discharged treated wastewater into the North Tyger River. *Id.* This wastewater treatment process and the wastewater discharge were regulated by a National Pollutant Discharge Elimination System ("NPDES") permit issued by the South Carolina Department of Health and Environmental Control ("DHEC"). *Id.*

When Laidlaw purchased the facility in early 1986, a NPDES permit was in place, and Laidlaw operated under this permit until the end of 1986. *Id.* On December 15, 1986, DHEC issued Laidlaw its own NPDES permit effective January 1, 1987 covering the facility's wastewater treatment plant. *Id.* This permit regulated the discharge amounts of various metals, including mercury, and the flow, temperature, toxicity, and pH of the facility's wastewater discharge. *Id.* at 118-119.

Laidlaw's 1987 permit drastically reduced the daily maximum mercury limit from 20 parts per billion ("ppb") to

1. In August 1998, Laidlaw closed its facility in Roebuck. The hazardous waste incinerator and waste-water treatment plant are no longer in operation.

1.33 ppb. JA p. 119. Because of this drastic reduction in the mercury limit, DHEC imposed an interim mercury limit of 10 ppb for 1987, with the 1.3 ppb limit becoming effective on January 1, 1988. In connection with the interim limit, DHEC required Laidlaw to conduct a feasibility study to determine if technology even existed that would allow Laidlaw to comply with its mercury limit of 1.3 ppb. *Id.* at 119-120. In addition, DHEC provided a "reopener" clause in the permit allowing Laidlaw to petition for a higher mercury limit based upon the results of the feasibility study. *Id.*

Ultimately DHEC determined that Laidlaw's mercury limit was unnecessarily low and resulted from an erroneous calculation. JA p.127. DHEC raised Laidlaw's daily maximum mercury limit to 10 ppb in the reissued permit, but, unfortunately, Laidlaw was burdened with a "draconian" mercury limit of 1.3 ppb during the relevant period of this citizen suit. *Id.* at 122.

Despite facing a daunting task in complying with a mercury limit of 1.3 ppb, Laidlaw diligently and determinedly sought a solution that would allow compliance. As early as August 1986, Laidlaw contacted Environmental Technology Engineering, Inc. ("ETE"), an environmental consulting firm, to conduct a feasibility study to determine what, if any, technologies could achieve the 1.3 ppb mercury limit. *Id.* at 120. ETE evaluated eight possible technologies, bench tested two of the eight, and eventually concluded that compliance with the 1.3 ppb mercury limit was "an extremely difficult and complex problem" and that "there is no inexpensive method to effectively remove mercury to the proposed [1.3 ppb] limit and the technology is still being developed." *Id.* at 120, 151. Despite such a bleak outlook, Laidlaw did not seek a higher mercury limit under the 1987 permit's reopener clause, but instead followed ETE's recommendation to install a second carbon adsorption unit. *Id.*

at 151. To Laidlaw's disappointment, the additional carbon adsorption unit did not enable Laidlaw to consistently achieve the 1.3 ppb mercury limit. *Id.* at 121.

In September 1988, Laidlaw and DHEC entered into a consent order, in response to which Laidlaw contracted with another environmental consulting firm, RMT, Inc., to fully reevaluate Laidlaw's wastewater treatment system. *Id.* RMT investigated four conceptual approaches to treating Laidlaw's wastewater, and in December 1988, recommended bench testing three metals removal systems. *Id.* These systems were tested in 1989, and Laidlaw chose the Lancy system. *Id.* Also in 1989, Laidlaw applied for and received DHEC's approval to replace the facility's two existing cooling towers with a single, more advanced cooling system. *Id.*

The Lancy system was constructed and installed in late 1990 and early 1991 as allowed by a critical construction permit issued by DHEC. *Id.* at 122. Indeed Laidlaw could not have installed control equipment prior to receipt of a construction permit from DHEC. Further, the Lancy system successfully removed all metals to NPDES permit limits with the exception of mercury. *Id.* Despite positive trial test results, Laidlaw continued to experience problems with meeting the extremely harsh mercury limit of 1.3 ppb. Laidlaw worked with both DHEC and the Lancy system manufacturer to "make operational adjustments to the system in an effort to achieve compliance with the mercury limit." *Id.* The manufacturer's engineers recommended adding varying amounts of iron sulfate, copper sulfate, and free sulfide to the Lancy system in an effort to reduce the mercury content, but this effort was unsuccessful. *Id.*

During the entire process, Laidlaw was ever vigilant in ensuring that its wastewater discharges were causing no environmental harm. Between 1986 and 1994, Laidlaw conducted semi-annual acute and chronic toxicity studies on macro invertebrates in the North Tyger River. *Id.* at 133. The studies

confirmed that Laidlaw's wastewater discharges were causing no environmental harm to the receiving river. *Id.*

Throughout 1992, Laidlaw experimented with various operational changes to the system and performed tests using chemicals and technologies both recommended by its consultants and developed internally by Laidlaw personnel. *Id.* at 123. Laidlaw even shut down its incinerator altogether for substantial periods of time in 1992 in an extraordinary effort to avoid violating the consent order with DHEC which remained under the jurisdiction of the state court until August 1993. *Id.* at 123-124.

After years of effort, Laidlaw achieved compliance with the mercury limit by adding carbon filters to the end of the Lancy system and by severely limiting the feed rate of mercury-containing waste into the incinerator well below the levels allowed under the operating authority for the incinerator. *Id.* at 124.[2]

Laidlaw took numerous steps to enable its facility to achieve compliance with an exceedingly stringent mercury limit. The district court characterized Laidlaw's efforts as follows:

> Laidlaw acted in good faith in relying on qualified environmental consultants to recommend the appropriate technology to solve its wastewater treatment problems. Laidlaw's good faith desire to achieve NPDES compliance is further evidenced by

2. Laidlaw could not meet the 1.3 ppb mercury limit using normal mercury feed rates as allowed under interim status and the U.S. EPA HSWA permit. This cost Laidlaw revenue because it could no longer send certain wastes to its Roebuck incinerator. Testimony of Dale Fentress, JA pp. 258-259.

> the fact that, after spending more than $1 million on consultants and new wastewater treatment equipment that did not result in compliance, Laidlaw ultimately found the solution through the efforts of its own personnel experimenting with different technologies combined with restricting mercury feed to the incinerator.

Id. at 148.

The petitioners[3] boldly assert that their citizen suit brought Laidlaw into compliance with its NPDES permit and that "Laidlaw took the actions the suit was designed to effectuate." Plaintiffs' Petition For A Writ Of Certiorari, (hereinafter "Pet.") p. 25. In reality, by the time plaintiffs filed suit on June 12, 1992, Laidlaw had been working toward a solution regarding its mercury limit for over five years. Further, by June 12, 1992, Laidlaw was on the verge of achieving compliance with the mercury limit of 1.3 ppb by adding activated carbon filters to the end of the Lancy system. JA p. 124. Plaintiffs' involvement did nothing more than divert Laidlaw's attention and resources and perhaps even slowed the process somewhat. Nonetheless, Laidlaw was successful in achieving its goal of compliance with its NPDES permit. *Id.* at 137-138.

The plaintiffs' action was tried on the merits from July 31 through August 2, 1995, and the district court issued its second opinion on January 21, 1997. JA pp. 115, 117. Significantly the district court found that between June 1992 and the issuance of the second opinion, there had been only one alleged monitoring violation and during the same period, zero reporting violations. *Id.* at 152. Further, the district court found that

3. Laidlaw does not agree that there should be three petitioners in this case since two — CLEAN and the Sierra Club — failed to serve 60 day notice letters.

Laidlaw had been in substantial compliance with all parameters in the 1987 permit since at least August 1992, some three years before the case was tried. The district court found also that the single mercury excursion in 1994 and in 1995 occurred even though no mercury was being fed into the incinerator. *Id.* at 152. The district court denied plaintiffs' request for injunctive relief because there was a lack of demonstrated harm to the environment and the fact that "Laidlaw is now and has for an extended period of time been in compliance with its [NPDES] permit." *Id.* at 156.

In accordance with Section 309(d) of the Clean Water Act, the district court considered six factors in determining whether a civil penalty should be assessed in addition to the $100,000 penalty that Laidlaw paid to DHEC. *Id.* at 135. In considering the lack of seriousness of the violations, the district court concluded that

> Laidlaw's monitoring and reporting deficiencies, all of which have long since been resolved, produced no direct environmental impact. There has been no demonstrated proof of harm to the environment.

Id. at 137.

In fact, in considering the history of the violations, the lack of seriousness of the violations, Laidlaw's good faith compliance efforts, and other factors as justice may require, the district court determined that a penalty lower than economic benefit was warranted. *Id.* at 135-155. After its thorough analysis of the six factors, the district court was convinced that Laidlaw should not be penalized in an amount equal to the economic benefit of non-compliance. *Id.* at 153-154.

Petitioners and Laidlaw appealed the district court's decision. Prior to oral argument at the Fourth Circuit Court of

Appeals, this Court decided *Steel Co. v. Citizens for a Better Environment,* 523 U.S. __, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998). Laidlaw stated in its opposition to plaintiffs' motion for additional briefing that the *Steel Co.* decision "is largely irrelevant to the standing issue" before the court of appeals. Second Supplemental Brief For Appellee, May 6, 1998, p.1. Laidlaw reasoned that since petitioners could not satisfy the first prong of the "constitutional minimum" requirements for standing under Article III of the United States Constitution — injury in fact — it was not necessary to reach the third prong of redressability. *Id.*

Applying the reasoning of *Steel Co.*, the court of appeals concluded that petitioners' action is "moot because the only remedy currently available to Plaintiffs — civil penalties payable to the government — would not redress any injury Plaintiffs have suffered." *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 149 F.3d 303, 307 (4th Cir. 1998). The court of appeals vacated the order of the district court and remanded with instructions to dismiss the petitioners' action. *Id.* at 307.

REASONS FOR DENYING THE WRIT

For almost three-quarters of a century, with only minor changes, the certiorari jurisdiction of this Court has been set out in its Rules as follows:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons.

Sup. Ct. R. 10. Petitioners claim that the court of appeals decision is inconsistent with this Court's decision in *Gwaltney*

of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc., 484 U.S. 49, 98 L. Ed. 2d 306 (1987) and with other courts of appeal is baseless and does not serve to warrant this Court's exercise of its judicial discretion to grant petitioners' petition.

I.

THE DECISION OF THE COURT OF APPEALS WAS A PLAINLY CORRECT APPLICATION OF THE LAW.

The decision below represented the court of appeals' interpretation of the law of the land as decided by this Court in *Steel Co.* There is no compelling reason to review the court of appeals application of settled law by revisiting this Court's decision in *Steel Co.*

Over the years, this Court has established that the "irreducible constitutional minimum of standing" contains three components — injury in fact, causal connection between the injury and the conduct complained of, and redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). This Court described these components as a triad comprising the "core of Article III's case-or-controversy requirement." *Steel Co.*, 140 L. Ed. 2d at 233. Redressability refers to a likelihood that the requested relief will redress the alleged injury. *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 45-46 (1976).

As Laidlaw will discuss later herein, the facts show that the relief requested by petitioners can no longer address their asserted injury. Once redressability is lost, a court loses jurisdiction as well and cannot proceed. When jurisdiction ceases to exist, "the only function remaining to the court is that of announcing the fact and dismissing the cause." *Ex parte McCardle*, 74 U.S. 506, 7 Wall 506, 514 (1869).

Petitioners mention in their petition that citizen groups in various lawsuits have had standing for the purpose of bringing their initial lawsuits. *See* Pet. pp. 8-13. Seemingly plaintiffs fail to grasp or acknowledge that even if standing is met initially, the court does not retain jurisdiction if the case is mooted by subsequent developments. *See Flast v. Cohen*, 392 U.S. 83, 20 L. Ed. 2d 947, 959 (1968).

This Court has described mootness as

> the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).

United States Parole Comm'n v. Geraghty, 445 U.S. 388, 63 L. Ed. 2d 479, 491 (1980) (quoting Monaghan, Constitutional Adjudication: *The Who and When*, 82 Yale L. J. 1363, 1384 (1973)). Just as standing must be maintained at all stages of the litigation, the mootness doctrine requires that "the controversy posed by plaintiffs' complaint be 'live' not only at the time the plaintiff files the complaint but also throughout the litigation process." *Rocky v. King*, 900 F.2d 864, 867 (5th Cir. 1990).

The court of appeals correctly applied the *Steel Co.* rationale to the facts before it. Rather than conflict with this Court's decision in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 98 L. Ed. 2d 306 (1987), the decision below is very much in line with *Gwaltney*. In addressing mootness and its relationship to citizen suits under the Clean Water Act, this Court stated as follows: "Long-standing principles of mootness, however, prevent maintenance of suit when 'there is no reasonable expectation that the wrong will be repeated.' " *Gwaltney*, 98 L. Ed. 2d at 323 (citations

omitted). This Court must have envisioned the scenario where the citizen suit would cease to be a valid case or controversy under the Constitution and would be dismissed accordingly. That is especially true where there is no possibility that a wrong will be repeated due to the closure of the facility.

II.

THE DECISION OF THE COURT OF APPEALS CREATED NO INCONSISTENCY AMONG CIRCUITS BUT MERELY FOLLOWED THE DECISION IN *STEEL CO.*

Petitioners' petition addresses numerous topics, but the issue central to the decision below and *Steel Co.* relates to the redressability of civil penalties. Petitioners first point to six courts of appeals for the proposition that penalties in citizen suits under the Clean Water Act are not moot even though claims for injunctive relief were not viable because defendants had brought themselves into compliance. Pet. p.13. Each of these decisions was decided before and without benefit of this Court's decision in *Steel Co.*

Were it not for *Steel Co.*, the court of appeals might have been the seventh court of appeals to have addressed penalties in a fashion similar to the six courts of appeal mentioned above. In *Sierra Club v. Simkins Industries, Inc.*, 847 F.2d 1109, 1113 (4th Cir. 1988), the Fourth Circuit Court of Appeals held that because "penalties can be an important deterrence against future violations" they could redress a private plaintiff's injury even though the money damages awarded were payable to the U.S. Treasury. *See Student Public Interest Research Group, Inc. v. AT & T Bell Laboratories*, 617 F. Supp. 1190, 1200-1201 (D.N.J. 1985). The court of appeals recognized that "because Steel Co. constitutes 'a superseding contrary decision of the Supreme Court,' we are required to follow it." *Friends of the Earth*, 149 F.3d at 306-307 n. 4.

The court of appeals noted that since petitioners did not appeal the denial of declaratory and injunctive relief,

> the only potential relief that may be available to redress their claimed injuries is the civil penalty imposed upon Laidlaw which would be paid to the United States Treasury.

Id. at 306; *see Atlantic States Legal Found., Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1131 n. 5 (11th Cir. 1990). Civil penalties payable to the U.S. Treasury cannot redress any injury suffered by a citizen plaintiff. *See Steel Co.*, 140 L. Ed. 2d at 235. In examining the *Steel Co.* decision, the court of appeals found that this Court reasoned as follows:

> [A]lthough a suitor may derive great comfort and joy from the fact that the United States Treasury is not cheated, that a wrongdoer gets his just desserts, or that the nation's laws are faithfully enforced, that psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury.

Id. The court of appeals correctly applied the reasoning of this Court and concluded that petitioners' action is moot because "the only remedy currently available to Plaintiff — civil penalties payable to the government — would not redress any injury Plaintiffs have suffered." *Friends of the Earth*, 149 F.3d at 307.

III.

A RECOVERY OF ATTORNEYS' FEES OR OTHER LITIGATION COSTS IS NOT AVAILABLE TO PETITIONERS BECAUSE THEY DID NOT PREVAIL OR SUBSTANTIALLY PREVAIL IN THE ACTION.

In 1987 the Clean Water Act was amended to read that a court

> may award costs of litigation (including reasonable attorney and expert witness fees) to any *prevailing or substantially prevailing party*, whenever the court determines such award is appropriate.

33 U.S.C. § 1365(d) (emphasis added). The court of appeals addressed the issue of awarding costs of litigation to petitioners. *See Friends of the Earth*, 149 F.3d at 307 n. 5.

The court of appeals examined the language of the Clean Water Act mentioned above and noted that an award of costs of litigation is available only to a prevailing or substantially prevailing party. *Id.* The court of appeals next pointed to its decision in *S-1 & S-2 v. State Board of Education of North Carolina*, 21 F.3d 49, 51 (4th Cir. 1994) in which it adopted Judge Wilkinson's dissenting opinion reported at 6 F.3d 160, 168-172 (4th Cir 1993). Judge Wilkinson stated plainly in his dissent the following:

> I do not understand how moot lawsuits, in which the possibility of relief against a party is by definition foreclosed, continue nonetheless to function . . . for the recovery of attorneys' fees.

6 F.3d at 170. In adopting Judge Wilkinson's dissent, the court of appeals held that "the dismissal on appeal of an action . . .

as moot operates to vacate the judgment below . . . and prevents the plaintiffs from being found prevailing parties . . ." *S-1 & S-2*, 21 F.3d at 51 (internal citations omitted). Although *S-1 & S-2* dealt with civil rights issues, the mootness consideration in this case involving the Clean Water Act is the same and should have the same result — no award of attorneys fees or other litigation costs.

Petitioners assert that the decision below and *S-1 & S-2* are inconsistent with decisions in nine other courts of appeal. Pet. p. 24. A review of the ten decisions attributed to nine courts of appeals reveal that they are easily distinguished. First, the issue of mootness was not even involved in seven of the ten cases. Second, in the remaining cases, voluntary action by one of the parties or action of a state environmental agency resulted in the dismissal of the action as mooted. Courts in none of the ten decisions were faced with facts where a plaintiff lacked standing to prosecute a citizen suit because the relief requested could not redress the injury plaintiff had allegedly suffered. *See Steel Co.*, 140 L. Ed. 2d at 232-235.

When confronted with a scenario here strikingly similar to *Steel Co.*, the court of appeals followed this Court's reasoning and concluded that petitioners' action was moot. The court of appeals could do nothing but vacate the order of the district court and remand with instructions to dismiss the action. After all, this Court has noted that

> [w]here it appears upon appeal that the controversy has become entirely moot, it is the duty of the appellate court to set aside the decree below and to remand the cause with directions to dismiss.

Great W. Sugar Co. v. Nelson, 442 U.S. 92, 60 L. Ed. 2d 735, 736 (1979) (quoting *Duke Power Co. v. Greenwood County*, 209 U.S. 259, 267, 57 S. Ct. 202, 81 L. Ed. 178 (1936)).

Once the court of appeals correctly applied the reasoning in *Steel Co.*, petitioners could not meet the definition of prevailing or substantially prevailing party. If there is no lower court decree in favor of the petitioners, they did not prevail on a single item of relief they sought. Since petitioners did not prevail in the district court, the court of appeals decision is consistent with the Court's decision in *Farrar v. Hobby*, 506 U.S. 103, 121 L. Ed. 2d 464 (1992). While addressing the recovery of attorney fees by a civil rights plaintiff, this Court stated that such a plaintiff "must obtain at least some relief on the merits of his claim." *Farrar*, 121 L. Ed. 2d at 503. It is impossible to bestow the mantle of prevailing party on plaintiffs in the absence of any relief on the merits of their claim.

CONCLUSION

There is no reason for this Court to review any of the issues raised by petitioners. The decision of the court of appeals was a plainly correct application of this Court's decision in *Steel Co.* The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JAN 19 1999
CLERK

(3)

No. 98-822

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

FRIENDS OF THE EARTH, et al.,
Petitioners,

v.

LAIDLAW ENVIRONMENTAL SERVICES (TOC), INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF

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REASONS FOR GRANTING THE PETITION

1. The petition (pp. 8-13) showed that the decision of the court below is directly inconsistent with this Court's decision in Gwaltney of Smithfield, Ltd v. Chesapeake Bay Foundation, Inc., 484 U.S. 49 (1987). In both cases, the district court had not granted injunctive relief and this issue had not been appealed. As a result, the only remaining issue was the imposition of civil penalties. In Gwaltney, even though all violations had ceased before the complaint was filed, after specifically discussing mootness, this Court remanded the case for the courts below to consider whether there was a risk of continuing violations when the complaint was filed and therefore whether civil penalties could be imposed. 484 U.S. at 67. In sharp contrast, in the present case, the court of appeals held that the fact plaintiffs' claim for injunctive relief was no longer in the case automatically made the case moot even though there was not only a risk of continuing violations but actual post-complaint violations.

As plaintiffs noted in the petition (pp. 10-11), the court of appeals did not discuss this Court's decision in Gwaltney even though plaintiffs had demonstrated that the present case was stronger than Gwaltney. Laidlaw does discuss Gwaltney (Laidlaw Opp. 9-10) and states, based on it, that "[t]his Court must have envisioned the scenario where the citizen suit would cease to be a valid case or controversy under the Constitution and would be dismissed accordingly" (id., p. 10). However, this is precisely the point. This Court in Gwaltney did contemplate situations where citizen suits under the Clean Water Act would be moot but plainly decided that the case before it was not moot. Since the facts here are even less supportive of mootness, the court of appeals' decision is directly inconsistent with Gwaltney. Laidlaw, like the court of appeals, has entirely failed to show

any distinction between the two cases. This is not surprising since no distinction exists.

Plaintiffs note that EPA fully supports plaintiffs' position on the issue of standing in the present case. We have attached the Brief of the United States in San Francisco Baykeeper v. Vallejo Sanitation and Flood Control District, E.D. Cal., No. Civ-5-96 1554 DFL, which is a similar citizen suit under the Clean Water Act. There, EPA stated that Laidlaw was "wrongly decided" (App. 25a, n. 9), and presented a detailed argument which is inconsistent with the court of appeals' application of Steel Co. in the present case (App. 1-31).

2. Plaintiffs showed in the petition (pp. 20-21, 24) that the decision below rejecting an award of attorneys' fees is directly in conflict with this Court's dictum in Gwaltney that citizen plaintiffs in suits under the Clean Water Act are entitled to attorneys' fees when an illegal discharger brings itself into compliance (484 U.S. at 67, n. 6) and with decisions of nine other circuits holding that fees are payable under fee-shifting statutes when the suit has led to the plaintiffs obtaining a significant part of the relief requested. In response, Laidlaw entirely ignores this Court's dictum in Gwaltney. As to the conflict in circuits, Laidlaw says (Laidlaw Opp. 13):

> First, the issue of mootness was not even involved in seven of the ten cases. Second, in the remaining cases, voluntary action by one of the parties or action of a state environmental agency resulted in the dismissal of the action as mooted. Courts in none of the ten decisions were faced with facts where a plaintiff lacked standing to prosecute a citizen suit because the relief requested could not redress the

injury plaintiff had allegedly suffered.

Laidlaw's response to the conflict in circuits is entirely unpersuasive. First, the decision below was based on the Fourth Circuit's earlier decision in S-1 & S-2 v. State Board of Education, 21 F.3d 49 (4th Cir. 1994) (en banc). Pet. App. 9a, n. 5. S-1 and S-2 involved mootness. 21 F.3d at 51. Moreover, in S-1 and S-2, the Fourth Circuit expressly rejected three of the decisions on which plaintiffs here relied to show a conflict of circuits. 6 F.3d at 169, n. 2 (adopted as en banc decision, 21 F.3d at 51).

Second, five of the cases relied on by plaintiffs were dismissed as moot. Comfort Lake Ass'n, Inc. v. Dresel Contracting, Inc., 138 F.3d 351, 357 (8th Cir. 1998) (plaintiffs in Clean Water Act suit entitled to fees if case has become moot because their suit resulted in compliance); Zinn by Blankenship v. Shalala, 35 F.3d 273, 274 (7th Cir. 1994)(awarding fees where "plaintiffs obtain the relief they seek through defendants' voluntary action" (id. at 276)); Baumgarten v. Harrisburg Housing Authority, 21 F.3d 541, 544 (3d Cir. 1994)(case dismissed because defendants' action met all of plaintiffs' demands); Little Rock School District v. Pulaski County Special School District, 17 F.3d 260, 263 (8th Cir. 1994) (plaintiffs entitled to fees when defendants' voluntary actions mooted the claim); Pembroke v. Wood County, 981 F.2d 225, 228, 231 (5th Cir. 1993), certiorari denied, 508 U.S. 973 (1993) (plaintiffs entitled to fees where case has become moot because of the litigation). Accord Atlantic States Legal Foundation, Inc v. Eastman Kodak Co., 933 F.2d 124, 128 (2d Cir. 1991) (citizen plaintiffs in Clean Water Act suit entitled to attorneys' fees even if case is dismissed as moot if compliance has resulted from the plaintiffs' suit); United States Environmental Protection Agency v. City of Green Forest, 921 F.2d 1394, 1402 (8th

Cir. 1990) (citizen plaintiffs entitled to fees in Clean Water Act suit where their action was barred by EPA action but citizens were catalyst for EPA action). As the Seventh Circuit has noted, the Fourth Circuit stands "alone." Zinn by Blankenship v. Shalala, supra, 35 F.2d at 275. See also Baumgarten v. Harrisburg Housing Authority, supra, 21 F.3d at 549 (Fourth Circuit "held otherwise" then four other circuits).

These cases, which held that plaintiffs are entitled to attorneys' fees when the litigation has become moot because the plaintiffs obtained the relief sought in the litigation, are directly contrary to the decision below. The determination of mootness in those cases necessarily meant that the plaintiffs could no longer obtain redress of the relief requested. Nonetheless, the courts of appeals upheld the award of attorneys' fees.

3. Laidlaw suggests that the case is moot because it has shut down its incinerator since the court of appeals issued its decision. Def. Opp. 1, n. 1, 10. However, Laidlaw has submitted no affidavit or other evidence to support the bare statements in its brief or any indication whether the shut down is temporary or permanent. Plaintiffs have ascertained that Laidlaw has not taken any action to terminate the NPDES permit. App. 33a. Since Laidlaw's NPDES permit is still in effect, it may discharge in the future whenever it cares to do so.

Moreover, Laidlaw filed a proposed order in the state court which was hearing a challenge to Laidlaw's permit for operation of the incinerator in November 1998, after the incinerator shut down. In that order, Laidlaw asked that issuance of the permit be affirmed and gave no indication that the incinerator would not be operated. Subsequently on

November 23, 1998, the court issued virtually the identical order. Thus, Laidlaw has the right to continue to operate the incinerator.

In any event, the shut down of the facility, even if it were permanent, would not moot the case. Laidlaw/Safety-Kleen[1/] has at least 16 other NPDES permitted facilities. Friends of the Earth and Sierra Club have members who use the waters affected by Laidlaw/Safety-Kleen's discharges from some of these facilities and their use and enjoyment of these waters is adversely affected by illegal discharges from these facilities. See App. 33a.

The imposition of civil penalties in this case will continue to redress the injuries of plaintiffs and their members. As we showed in the petition (p. 15), both this Court and Congress have specifically found that penalties under the Clean Water Act deter violations. Tull v. United States, 481 U.S. 412, 422 (1987) ("Congress wanted the district court to consider the need for retribution and deterrence * * * when it imposed civil penalties" under the Clean Water Act"). See also Hudson v. United States, 118 S. Ct. 488, 494 (1997)("All civil penalties have some deterrent effect"); Department of Revenue v. Kurth Ranch, 511 U.S. 767, 778 (1994)("civil penalties * * * deter certain behavior").

In Steel Co. v. Citizens for a Better Environment, 118 S. Ct. 1003 (1998), this Court held that civil penalties did not satisfy redressability in a case where the defendant was not violating the statute at the time of the complaint and there was no allegation in the complaint of continuing violation.

1/Laidlaw acquired Safety-Kleen in April 1998 and then changed its own name to Safety-Kleen. Def. Opp. ii.

Id. at 1017-1018. In analyzing the redressability issue relating to civil penalties, the Court emphasized that the penalties were paid to the U.S. Treasury rather than the plaintiff. Id. at 1018. This analysis suggests that general deterrence, the effect of the imposition of a civil penalty on other dischargers, does not support redressability. See also id. at 1019. However, in view of this Court's emphasis on the fact that Steel Co. involved only initial standing and not mootness after initial standing had been shown (id. at 1019-1020), it is not clear whether this determination affects the present case.

In any event, even if Steel Co. establishes that general deterrence does not satisfy the requirement of redressability for purposes of mootness, the imposition of a civil penalty in this case constitutes specific deterrence. Specific deterrence involves the imposition of civil penalties which would affect the conduct of the defendant itself. United States v. Pleasant, 730 F.2d 657, 662 (11th Cir. 1984), certiorari denied, 469 U.S. 869 (1984); Shepard v. Taylor, 556 F.2d 648, 653 (2d Cir. 1977). Since Laidlaw/Safety-Kleen has other facilities where plaintiffs' members are injured by illegal discharges, the imposition of a civil penalty in this case will redress harm to plaintiffs even if the South Carolina incinerator were permanently shut down.

In short, this case continues to present the issues decided by the court of appeals. As the petition for a writ of certiorari shows, the court of appeals' decision presents extremely important issues involving conflicts with decisions of this Court and numerous courts of appeals. The shut down of Laidlaw's facility provides no support for denying the writ.

Even if the shut down of the facility had some effect on whether this Court should grant certiorari concerning the court of appeals' dismissal of the case on the ground of mootness, it clearly has no effect on the denial of attorneys' fees by the court of appeals. The denial of attorneys' fees involves whether, when a lawsuit has been properly filed and a substantial portion of the relief requested has been obtained, attorneys' fees may be awarded when the case becomes moot. Thus, the attorneys' fees issue assumes arguendo that the dismissal of the case on the ground of mootness was correct. Laidlaw's new reason for claiming mootness is therefore irrelevant.

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APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

SAN FRANCISCO BAYKEEPER, a non-profit corporation, Plaintiff, v. VALLEJO SANITATION AND FLOOD CONTROL DISTRICT, Defendant.	No. CIV-S-96 1554 DFL Hearing Date: January 15, 1999 Time: 10:00 a.m. Dept:Courtroom 3 Trial Date: October 25, 1999

BRIEF OF THE UNITED STATES AS AMICUS CURIAE IN RESPONSE TO VALLEJO'S MOTION TO DISMISS PLAINTIFF'S CIVIL PENALTY CLAIMS

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Issue Presented

Whether the Article III standing doctrine precludes Congress from granting courts jurisdiction to assess civil monetary penalties, in Clean Water Act citizen suits, against a defendant who, at the time the complaint is filed, is violating or is imminently expected again to violate the Act.

Interests of the United States

The United States has the lead role, along with the states, in implementing and enforcing the Clean Water Act ("Act"), 33 U.S.C. § 1251 et seq. Section 505 of the Act also authorizes adversely affected private persons, or "citizens," to enforce many of the Act's requirements, and grants the district courts jurisdiction in citizen suits to issue injunctions and to assess civil monetary penalties payable to the United States. See 33 U.S.C. § 1365(a), (g). The Vallejo Sanitation and Flood Control District ("Vallejo") contends that Article III's "case" or "controversy" requirement bars the courts from exercising Section 505 civil penalty jurisdiction, however, because such penalties cannot, as a matter of law, redress any injury suffered by citizen plaintiffs. The United States files this amicus curiae brief to defend the constitutionality of the courts' statutory jurisdiction to assess, and citizen plaintiffs' standing to seek, civil monetary penalties.

The ability of citizen plaintiffs to enforce the Clean Water Act allows those individuals who are most directly injured by unlawful pollution — the people who live, work, and play downstream from illegal discharges — to protect their health and their environment. Citizen enforcement authority is important because resource

constraints do not allow the Government to pursue all violations that warrant enforcement. A citizen suit that is backed by the prospect of civil penalties provides a strong incentive for a defendant violator to comply quickly with the Act. For example, between January 20, 1993, and May 5, 1995, defendants in citizen enforcement suits that alleged Clean Water Act claims paid more than $3 million in civil penalties to the United States, as a result of judgments or settlements, and settlements in such suits resulted in almost an additional $10 million in payments to states.[1/] During this same period, settling defendants who were parties to consent decrees in seventy-eight Clean Water Act citizen suits — and who faced or paid such penalties — agreed to fund at least $61 million in quantifiable injunctive relief, and to undertake significant additional, unquantified injunctive relief, to resolve and address alleged Clean Water Act violations. Id. As Congress recognized in enacting subsequent citizen enforcement provisions, citizen suits are critical to filling the gap between the number of significant environmental violations and the limited governmental enforcement resources available to address such violations. See, e.g., 131 Cong. Rec. 34650 (Dec. 5, 1985) (statement of Rep. Glickman) ("In view of the government's limited and overburdened enforcement authority, citizen suits are essential to assure compliance with the law."); House Committee on Energy and Commerce, Superfund

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1/See Environment and Natural Resources Division of the Department of Justice: Hearing Before the Subcommittee on the Constitution of the House Committee on the Judiciary, 104th Cong., 1st Sess. 296-302 (1995) (committee print) (letter from Kent Markus, Acting Assistant Attorney General, to Rep. Charles T. Canady, Chairman (May 5, 1995)).

Amendments of 1985, H.R. Rep. No. 253, 99th Cong., 1st Sess., pt. 5, at 83 (Nov. 12, 1985), reprinted in 1986 U.S.C.C.A.N. 3124, 3206 ("Citizen suits provisions [sic] have been found to be helpful both in encouraging diligent Federal enforcement of environmental statutes and in locating and taking actions against violators of these Acts.").

Factual Background

San Francisco BayKeeper ("BayKeeper") brought this Clean Water Act citizen suit against the Vallejo Sanitation and Flood Control District ("Vallejo") for unlawfully discharging raw sewage and other pollutants into the San Pablo Bay and San Francisco Bay Estuary at Mare Island Strait and Carquinez Strait, and by unlawfully failing to report its discharges as required by its permit. BayKeeper sought injunctive relief, civil penalties, and fees and costs. Vallejo moved for summary judgment on standing, and the parties filed cross-motions for summary judgment on liability. On December 11, 1997, this Court held that BayKeeper had introduced sufficient evidence of standing to go to trial on that issue.[2/] See Mem. of Op. and Order 10 (Dec. 11, 1997).

On May 27, 1998, this Court granted summary judgment for BayKeeper on Vallejo's liability. This Court held that — both before and after BayKeeper filed its complaint — Vallejo was in violation of its Clean Water Act permit requirements concerning chlorine residual, total

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2/This Court granted summary judgment on standing against an individual plaintiff, Michael Lozeau. See Mem. of Op. and Order 10 (Dec. 11, 1997).

suspended solids, copper, settleable matter, median and total coliform, overflow and bypass, and reporting. See Mem. of Op. and Order 10-17 (May 27, 1998).[3]/

3/This Court has held that Vallejo continued to violate the Clean Water Act after the complaint was filed, and Vallejo's brief does not assert that its violations have ceased. The United States is unaware of evidence that "it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., 484 U.S. 49, 66 (1987) (emphasis in original; internal quote marks omitted). Nevertheless, in the United States' present posture as amicus curiae, the United States takes no position on Vallejo's current compliance. Vallejo's argument appears to be that its present compliance (or noncompliance) status is irrelevant because the Article III standing doctrine bars civil penalties in all citizen suits, even if the defendant continues to violate the Clean Water Act through final judgment. Thus, Vallejo challenges only BayKeeper's initial standing; Vallejo does not argue that it has mooted this case by ceasing its violations, and does not even attempt to demonstrate that its violations cannot reasonably be expected to recur. Compare generally, e.g., Lujan v. Defenders of Wildlife, 504 U.S. 555, 569 n.4 (1992) (holding, in a standing case, that "jurisdiction is to be assessed under the facts existing when the complaint is filed"); County of Riverside v. McLaughlin, 500 U.S. 44, 50-52 (1991) (holding that the plaintiff had standing based on the facts at the time of the complaint, even though post-complaint developments mooted the case); Gwaltney of Smithfield v. Chesapeake Bay Found., 484 U.S. 49, 69 (1987) (Scalia, J., concurring in part) (stating that standing is determined based on the facts at the time of the complaint); with, e.g., Cardinal Chemical Co. v. Morton Int'l, Inc., 508

Summary of Argument

Consistent with Article III standing doctrine, courts may assess civil monetary penalties in citizen suits, where such penalties will tend specifically to deter noncompliance by a defendant who, when the complaint is filed, is violating or is imminently expected again to violate the Clean Water Act. Last term, Steel Company v. Citizens for a Better Environment, 118 S. Ct. 1003 (1998), reaffirmed that specific deterrence of a defendant is cognizable redress under Article III's standing test, and that remedies designed specifically to deter ongoing or imminent future violations of the law by a defendant satisfy the redressability requirement. Moreover, the Supreme Court repeatedly has recognized — in contexts ranging from application of the Clean Water Act to imposition of civil contempt sanctions and punitive damages — that civil penalties coerce compliance with the law by a defendant through specific deterrence. Thus, far from supporting Vallejo's facial challenge, Steel Company teaches only that civil penalties payable to the Treasury cannot redress citizens' injuries from "purely past," nonrecurring violations. Here, where the Court has found that the defendant's violations continued at the time of the complaint, civil penalties can cognizably coerce compliance — redressing the plaintiff's injuries from the defendant's ongoing and future illegal discharges — and Article III

U.S. 83, 98 (1993) (stating that the burden shifts to the defendant to prove mootness); Gwaltney, 484 U.S. at 66 (stating that voluntary cessation of illegal activity moots a case only where the defendant proves that the wrong cannot reasonably be expected to recur); City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 289 (1982) (same).

standing doctrine poses no barrier to the Court's assessment of civil penalties.

Argument

1. Vallejo's Argument Ignores *Gwaltney* and Other Supreme Court Cases. — Article III restricts the judicial power of federal courts to "cases" or "controversies." This requirement serves to "limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process" and also "to assure that the federal courts will not intrude into areas committed to the other branches of government." Flast v. Cohen, 392 U.S. 83, 95 (1968). One aspect of the case-or-controversy requirement is the standing doctrine, which requires a plaintiff who seeks to invoke the jurisdiction of a federal court to show (1) either a present or threatened future "injury in fact" that (2) is "causal[ly] connect[ed]" to the challenged conduct and that (3) "likely" would be redressed by a favorable decision. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (emphasis omitted; internal quote marks omitted).

Vallejo argues, based on a misreading of Steel Company v. Citizens for a Better Environment, 118 S. Ct. 1003 (1998), that Article III's standing doctrine prohibits courts from assessing civil penalties in citizen suits. In Vallejo's view, penalties payable to the Treasury can never redress any injury suffered by a citizen plaintiff. Notwithstanding that Congress provided that the district courts "shall have jurisdiction" in Clean Water Act citizen suits "to enforce" the Act and "to apply any appropriate civil penalties," 33 U.S.C. § 1365(a) (emphasis added),

Vallejo contends that Article III bars the courts from exercising such jurisdiction.

Given the Supreme Court's repeated observations that Clean Water Act citizen suitors may seek civil penalties payable to the Treasury, Vallejo's proposed result would be, to say the least, surprising. See Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., 484 U.S. 49, 53 (1987); Middlesex County Sewage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 14 n.25 (1981); accord Sierra Club v. Electronic Controls Design, Inc., 909 F.2d 1350, 1352, 1354 (9th Cir. 1990). Indeed, in Gwaltney, the Supreme Court remanded a Clean Water Act citizen enforcement action to allow the citizen plaintiffs to demonstrate a good faith basis for their allegation that the defendant was liable for violations continuing at the time of the complaint — despite the fact that the only relief the plaintiffs still sought was civil penalties. Compare 484 U.S. at 67 with Chesapeake Bay Found. v. Gwaltney of Smithfield, Ltd., 890 F.2d 690, 692 & n. 2 (4th Cir. 1989) (noting that the district court had assessed penalties but denied an injunction, and that the defendant only had appealed). Thus, under Vallejo's reading of Steel Company, Gwaltney necessarily would have been wrongly decided. But Steel Company itself never suggested that it overruled Gwaltney.

Vallejo's mistake is to conflate the Supreme Court's discussion of general deterrence, which cannot satisfy the standing doctrine's redressability test, with the Court's discussion of specific deterrence, which can.[4]/ As shown

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4/Specific deterrence" generally is used to mean deterrence of future misconduct by the same offender, while "general

below, civil penalties can redress a plaintiff's injuries from a defendant's ongoing and future violations by coercing the defendant's compliance — that is, through specific deterrence. Vallejo's contrary argument rests on one or both of two mistaken premises: Either Vallejo assumes that Article III's redressability test is not satisfied by remedies that specifically deter a defendant's ongoing or future violations, or Vallejo assumes that the assessment of civil penalties cannot deter a defendant from committing future violations. The first premise — that specific deterrence is not cognizable under Article III — is inconsistent with a vast and unquestioned body of Supreme Court jurisprudence, including Steel Company itself. See Argument 2, infra. The second premise — that civil penalties cannot specifically deter a defendant from future violations — is unsupported by Steel Company and contrary to numerous Supreme Court decisions. See Argument 3, infra.

2. Remedies that Specifically Deter Noncompliance Are Sufficient and Cognizable Redress for Article III Standing Purposes. — Remedies designed to coerce compliance by a defendant who is in continuing or imminent future violation of the law — that is, remedies that work "specific deterrence" — unquestionably satisfy the redressability prong of Article III's standing doctrine where a plaintiff is injured by a defendant's ongoing or prospective violations. After all, coercion of compliance is

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deterrence" generally is used to mean deterrence of future misconduct by others. See, e.g., United States v. Pleasant, 730 F.2d 657, 662 (11th Cir. 1984), cert. denied, 469 U.S. 869 (1984); Shepard v. Taylor, 556 F.2d 648, 653 (2d Cir. 1977).

the "sole function" of injunctive relief, United States v. Oregon State Medical Soc'y, 343 U.S. 326, 333 (1952), and no one questions private litigants' standing to seek such relief, see, e.g., Steel Co., 118 S. Ct. at 1019. Similarly, coercion of compliance is a principal purpose of civil contempt sanctions, and there can be no doubt that private litigants have standing to seek such sanctions. Cf., e.g., Lamb v. Cramer, 285 U.S. 217, 219 (1932) (holding that a private litigant may initiate civil contempt proceedings to secure compliance with a court order); In re Sealed Case No. 98-3077, 151 F.3d 1059, 1069 (D.C. Cir. 1998) (holding that a civil contempt proceeding "may be initiated by a private plaintiff"). Likewise, private litigants have always been thought to have standing to seek punitive damages, which "are not compensation for injury" but instead are "private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." International Bhd. of Elec. Workers v. Foust, 442 U.S. 42, 48 (1979) (internal quote marks omitted; emphasis added).

Steel Company reaffirmed that specific deterrence of a defendant's future violations satisfies the Article III standing doctrine's redressability requirement. Steel Company decided the narrow question whether a citizen plaintiff had standing to sue "for purely past violations," where the plaintiff alleged no prospect that the defendant would violate the law again. 118 S. Ct. at 1008, 1019. The plaintiff lacked standing because the relief that it sought — including civil monetary penalties — would not redress its injuries from those purely past violations. Id. at 1018-19. But, in discussing injunctive relief, the Court made clear that a remedy designed to specifically deter a defendant from anticipated future noncompliance does provide adequate Article III redress:

> The remaining relief respondent seeks *** is injunctive in nature. It cannot conceivably remedy any past wrong but is aimed at deterring petitioner from violating EPCRA in the future. The latter objective can of course be "remedial" for Article III purposes, when threatened injury is one of the gravamens of the complaint. If respondent had alleged a continuing violation or the imminence of a future violation, the injunctive relief requested would remedy that alleged harm. But there is no such allegation here — and on the facts of the case, there seems no basis for it. Nothing supports the requested injunctive relief except respondent's generalized interest in deterrence, which is insufficient for purposes of Article III.

Steel Co., 118 S. Ct. at 1019 (emphasis added). In this passage, the Court made clear that specific, but not general, deterrence is cognizable redress under the Article III standing doctrine. Although raised in the context of injunctive relief, the Court's reasoning applies equally to other types of relief that may be used specifically to deter a defendant's future noncompliance.

Notwithstanding Steel Company's explicit statement that specific deterrence is cognizable under Article III, Vallejo contends that the specific deterrent effect of civil penalties does not satisfy the Article III standing doctrine's redressability requirement. See Vallejo Mem. at 3 ("That the award of penalties might deter the defendant from future violations *** fell short of satisfying the test for standing" (emphasis added).). Vallejo rests its argument against specific deterrence on the Steel Company Court's rejection of general deterrence as a form of Article III redress. Vallejo points to a passage in which the Court

held that the possibility that civil penalties "will deter the risk of future harm" is not sufficient to satisfy Article III. 118 S. Ct. at 1018. The Court explained that:

> [S]uch a principle would make the redressability requirement vanish. By the mere bringing of the suit, every plaintiff demonstrates his belief that a favorable judgment will make him happier. But although a suitor may derive great comfort and joy from the fact that the United States Treasury is not cheated, that a wrongdoer gets his just deserts, or that the nation's laws are faithfully enforced, that psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury.

Id. at 1018-19 (emphasis in original).

In context, this passage restates only the unsurprising proposition that, absent any allegation of future violations by the defendant itself, a "generalized interest in deterrence *** is insufficient for purposes of Article III." Id. at 1019 (emphasis added). The passage can refer to nothing else, for the Steel Company plaintiff sought only penalties for "purely past violations." Id. at 1008. Such penalties could not coerce compliance by the defendant because there was nothing to coerce: The Steel Company plaintiff conceded that the defendant was in compliance and would remain so. Penalties for purely past violations could at most have had some general deterrent impact on possible future violations by other, unknown, unrelated persons who might never cause the plaintiffs any injury. Faced with those facts, the Court affirmed that such general deterrence is not enough, that the "great comfort" that a plaintiff may receive from knowing that

"the nation's laws are faithfully enforced," without redress of a particularized injury to the plaintiff, "is not an acceptable Article III injury." Id. at 1019.

Thus, Vallejo mistakes Steel Company's terse discussion of general deterrence for a holding concerning specific deterrence, but ignores Steel Company's own discussion of specific deterrence, just one opinion page later. In this case, the plaintiff does not seek a generalized pronouncement about the law; instead, it seeks an order assessing penalties to deter Vallejo from continuing to pollute waters that the plaintiff's members allegedly use. Far from supporting Vallejo's position, Steel Company reaffirms that such relief, "aimed at deterring [the defendant itself] from violating [the law] in the future," does provide a sufficient and cognizable Article III remedy. Id. at 1019. That must be the law, for if Article III barred courts from imposing remedies designed as specific deterrents, then the courts would lack jurisdiction also to impose injunctions and civil contempt sanctions. See supra.

3. Civil Penalties Payable to the Treasury Provide Article III Redress for Continuing or Imminent Future Violations by Specifically Deterring Future Noncompliance. — Given that Article III standing doctrine poses no jurisdictional barrier to remedies aimed at specifically deterring noncompliance by a defendant who is in violation at the time of the complaint, as Vallejo was, Vallejo must fall back on an argument that civil penalties do not specifically deter violations of the law. That counterintuitive suggestion fails for four independent reasons.

First, the Supreme Court itself has long recognized that the threat and assessment of civil monetary penalties, including Clean Water Act penalties, deters misconduct by persons who are or may be penalized. See, e.g., Department of Revenue v. Kurth Ranch, 511 U.S. 767, 778 (1994) (stating that "civil penalties *** deter certain behavior"); Tull v. United States, 481 U.S. 412, 422 (1987) (holding that "Congress wanted the district court to consider the need for retribution and deterrence, in addition to restitution, when it imposed civil penalties" under the Clean Water Act (emphasis added)); Weinberger v. Romero-Barcelo, 456 U.S. 305, 314 (1982) ("An injunction is not the only means of ensuring compliance. The [Clean Water Act] itself, for example, provides for fines and criminal penalties."); Hudson v. United States, 118 S. Ct. 488, 494 (1997) ("[A]ll civil penalties have some deterrent effect *** ."); Natural Resources Defense Council v. Texaco Refining, 2 F.3d 493, 503 n. 9 (3d Cir. 1993) ("[T]he imposition of penalties significantly enhances the deterrent effect of a citizen suit."); cf. O'Shea v. Littleton, 414 U.S. 488, 503 (1974) (holding that the threat of fines and imprisonment under a criminal statute will exercise a deterrent effect, even absent an injunction).[5]/

5/The Supreme Court also has opined that compensatory damages, like an injunction, deter future violations by a defendant. See City of Los Angeles v. Lyons, 461 U.S. 95, 112-13 (1983). Similarly, the Supreme Court has observed that punitive damages "deter" future misconduct. Foust, 442 U.S. at 48 (internal quote marks omitted). From the defendant's perspective — the perspective that matters for purpose of determining whether the defendant will be deterred — there is little reason to think that paying damages

In Bennett v. Spear, 117 S. Ct. 1154 (1997), for example, the Court found that the citizen plaintiff had standing based in part on the specific deterrent effect that the threat of civil monetary penalties would have on the party that injured the plaintiff. The plaintiff expected to be injured by a Bureau of Reclamation's (BOR) decision to restrict certain water uses. However, instead of challenging the BOR's water use decision directly, the plaintiff challenged a Fish and Wildlife Service (FWS) "biological opinion" that had informed the BOR's decision. The Government argued that the plaintiff lacked standing to challenge the FWS opinion because the FWS had not harmed the plaintiff, the FWS opinion did not bind the BOR, and a successful challenge to the FWS opinion would therefore not redress the plaintiff's injury. Id. at 1163-64. The Court disagreed, reasoning that the BOR would be coerced to follow the FWS's views by the threat of civil and criminal sanctions under the Endangered Species Act. Id. Although BOR could legally ignore the FWS opinion, and although no enforcement action was threatened or pending against BOR, the Court noted that compliance by the BOR with the FWS opinion would immunize the BOR and its employees from Endangered Species Act penalties for possible future violations. Id. at 1163-65. Thus, the Spear Court found that a successful challenge to the FWS opinion would redress the plaintiff's injury from the BOR decision because the BOR was likely to follow FWS's views to avoid the possibility of penalties

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would have more of a deterrent effect than paying civil penalties. Thus, the Court's observations that damages deter future misconduct support the conclusion reached by the many cases that say that civil penalties deter future misconduct.

in the future. If an indirect possibility of penalties for unknown future violations is sufficiently coercive to satisfy Article III's redressabilty test, as in Spear, then surely the coercive effect of civil penalties assessed directly against the defendant for each day of each violation of the Clean Water Act also is sufficiently coercive to satisfy the redressability test.[6]/

Second, there is no doubt that the Article III redressability requirement is satisfied by an injunction to deter future noncompliance, see Steel Company, 118 S. Ct. at 1019, yet the specific deterrent effect of an injunction depends largely on the threat of civil penalties that give such injunctions teeth. Indeed, at the initiation of a citizen suit, the possibility of civil penalties may be a far more powerful specific deterrent than the possibility of an injunction: The defendant accrues additional civil penalty

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6/Steel Company reaffirmed that Article III redressability turns on the relief the plaintiff requests — unless the request is wholly frivolous — even if the court ultimately denies the relief on the merits. 118 S. Ct. at 1010. The subsequent question of what relief is appropriate "relat[es] to the exercise rather than the existence of judicial power." City of Mesquite, 455 U.S. at 289; see also United States v. Concentrated Phosphate Export Ass'n, 393 U.S. 199, 203 (1968); United States v. W.T. Grant Co., 345 U.S. 629, 633-34, 635-36 (1953); Bell v. Hood, 327 U.S. 678, 682-83 (1946); Binderup v. Pathe Exchange, Inc., 263 U.S. 291, 305-06 (1923). Thus, if BayKeeper in good faith sought civil penalties that, if assessed, would by likely to deter ongoing or future noncompliance by Vallejo, that specific deterrent effect would satisfy the standing doctrine's redressability test, even if the Court ultimately did not assesses penalties.

liability for each day of violation until it comes into compliance. 33 U.S.C. §§ 1365(a), 1319(d). By contrast, contempt sanctions cannot be imposed until after an injunction is issued and then violated. As the Supreme Court has explained, "[i]f violators faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality." Albemarle Paper Co. v. Moody, 422 U.S. 405, 417 (1975).

Third, Congress plainly believes that civil penalties do deter violations of the law, and Congress' factual conclusions are entitled to substantial deference. See, e.g., Preseault v. Interstate Commerce Comm'n, 494 U.S. 1, 17 (1990); Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 330 n.12 (1985). As Gwaltney noted, the legislative history of the Clean Water Act makes clear that Congress authorized citizen suits precisely to allow private persons to abate violations. 484 U.S. at 61. In furtherance of this specific deterrent goal, Congress authorized courts in citizen suits to grant injunctions and to assess civil penalties under the Act's general civil penalties provision. 33 U.S.C. §§ 1365(a), 1319(d). "Congress wanted the district court to consider the need for retribution and deterrence, in addition to restitution, when it imposed civil penalties" under this general civil penalty provision. Tull v. United States, 481 U.S. 412, 422-23 (1987) (emphasis added; citing 123 Cong. Rec. 39191 (1977)). Given Congress' purpose of abatement, Congress must have believed that the threat of penalties — and the imposition of civil penalties in the event of actual non-compliance — would specifically deter violations of the law.[7]/ See also

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7/Political philosophers have recognized as least since the Framer's era that monetary punishments deter violations of

S. Rep. No. 228, 101st Cong., 1st Sess. 373 (1989), reprinted in 1990 U.S.C.C.A.N. 3386, 3756 (stating that, in citizen suits under the Clean Air Act, "assessment of civil penalties for violations *** [is] necessary for deterrence, restitution, and retribution").

Fourth, as a factual matter, penalties have been empirically demonstrated to deter, so there is little warrant for Vallejo's proposed per se legal conclusion that civil penalties do not coerce more rapid compliance. For example, one study of actual enforcement of federal water pollution control laws found that enforcement efforts under a statute providing for civil penalties do deter water polluters. See Dennis Epple & Michael Visscher, "Environmental Pollution: Modeling Occurrence, Detection, and Deterrence," 27 J. Law & Econ. 29, 56 (Apr. 1984).

Nothing in Steel Company suggests that the Court there considered the specific deterrent effect of civil monetary penalties on future noncompliance, let alone that the Court overruled the Court's repeated past statements that civil penalties do deter, or created a per se rule that

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the law by removing the incentives for noncompliance. See, e.g., Jeremy Bentham, The Principles of Morals and Legislation 147 (Prometheus Books 1988) (originally published 1781) ("The temptation, then, may be said to be strong, when the pleasure or advantage to be got from the crime is such as in the eyes of the offender must appear great in comparison of the trouble and danger that appear to him to accompany the enterprise *** ."); id. at 189-91 (recognizing that "pecuniary" punishments can be set at a level designed to remove the incentive to commit misdeeds).

civil penalties never have a specific deterrent effect. On Steel Company's facts, the question of whether civil monetary penalties specifically deter was not presented. Given the overwhelming support for civil penalties' deterrent effect — and given Steel Company's own statement that specific deterrent relief satisfies the Article III redressability requirement — Article III poses no barrier to Congress' grant of jurisdiction to assess penalties in citizen suits to specifically deter noncompliance by the defendant.[8]/

8/A claim for civil monetary penalties to coerce compliance is a "case[] or controversy[] of the sort traditionally amendable to and resolved by the judicial process." See Steel Co., 118 S. Ct. at 1016. Laws allowing private persons to recover civil penalties for the government are hardly novel to this century. See Lake Shore & Mich. S. Ry. Co. v. Ohio, 173 U.S. 285, 286 (1899) (discussing an 1889 state law that authorized "any person" to sue persons who violate a state rail law to collect civil monetary penalties payable to "the general fund of the county"). Indeed, courts have always been thought to have Article III jurisdiction to incarcerate condemners in civil contempt proceedings initiated by one private party against another, because incarceration coerces compliance. See, e.g., Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 442, 444-45 (1911) (stating that imprisonment for civil contempt "is intended to be remedial by coercing the defendant to do what he has refused to do" and that "[p]roceedings for civil contempt are between the original parties"). Likewise, in the Framers' era, creditors apparently had a justiciable interest in having their debtors imprisoned. Cf. Randolph v. Donaldson, 13 U.S. (9 Cranch.) 76, 84-86 (1815) (discussing a federal law under which a federal marshal could be liable to a private creditor for the

4. The Two Other Supreme Court Cases Cited by Vallejo Are Inapposite to the Specific Deterrent Redress of Civil Penalties. — Despite the fact that Steel Company involved only past violations, Vallejo argues that Steel Company prohibits civil monetary penalties for ongoing violations because "the [Steel Company] Court relied on two cases *** where the alleged violations and resulting harms were ongoing."[9]/ Because neither of these other

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escape of a debtor who was in the marshal's custody); Snead v. McCoull, 53 U.S. (12 How.) 407, 410 (1851) (noting that the debtor was incarcerated upon a writ of capias ad satisfaciendum under an 1800 federal law); Sir William Holdsworth, 8 A History of English Law 231 (2d ed. 1937) (reprinted 1966) (explaining that, at common law, a writ of capias ad satisfaciendum allowed a creditor to "take his debtor's body in execution"). Certainly such incarceration and imprisonment has a greater element of retribution than does the assessment of monetary civil penalties, and yet private litigants could seek such sanctions, because they coerce compliance.

9/Vallejo also relies on Friends of the Earth v. Laidlaw Envtl. Serv. (TOC), Inc., 149 F.3d 303 (4th Cir. 1998), petition for cert. filed, No. 98-822 (Nov. 9, 1998), and San Francisco BayKeeper v. Cargill Salt, No. C 96-02161 CAL (N.D. Cal. Nov. 19, 1988) (unpublished order). As noted in a recent decision from the Southern District of California, Laidlaw involved violations that had ceased, and is factually dissimilar from this case. See Op. and Order Denying Mot. to Preclude Civil Penalties 2, Natural Resources Defense Council v. Southwest Marine, Inc., Civ. No. 96 CV 1492-B (AJB) (Nov. 19, 1998). In any event, based on the arguments presented in this brief, the United States respectfully suggests that both cases were wrongly decided.

cases involved claims for civil penalties, or even suits against the party that had injured the plaintiffs, both cases are inapposite.

In Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 32-33 (1976), several individuals who had been denied hospital service due to indigency, as well as several organizations that represented such individuals, challenged an Internal Revenue Service (IRS) ruling that, according to the plaintiffs, unlawfully encouraged some hospitals to deny benefits to indigents. The plaintiffs did not sue the hospitals that had denied them service, however. Id. at 41. Thus, Simon did not involve specific deterrence at all, but instead raised a question whether an IRS ruling caused the plaintiffs' injuries by encouraging unlawful conduct. Faced with a rather tenuous nexus between the alleged violation and claimed injury, the Court held that the plaintiffs lacked standing. "[I]t is purely speculative whether the denials of service" were caused by the IRS, the Court said, id. at 42-43, and therefore it was "equally speculative" whether a remand for the IRS to reconsider its ruling would lead to more hospital service for the plaintiffs, id. at 43. As with Steel Company, a ruling for the Simon plaintiffs would at most have served to "vindicat[e] the rule of law," Steel Co., 118 S. Ct. at 1018, because the plaintiffs suggested "no substantial likelihood that victory in this suit would result in" a benefit to the plaintiffs, Simon, 426 U.S. at 45-46. Here, by contrast, BayKeeper seeks to deter future unlawful (and injurious) discharges by asking this Court to assess civil monetary penalties directly against the violator.

In Linda R. S. v. Richard D., 410 U.S. 614, 614-15 (1973), the mother of an illegitimate child sued to enjoin discriminatory application of a state statute that

criminalized parents' willful neglect or nonsupport of their children. The state statute had been interpreted by the state courts to apply only to the parents of legitimate children, however, and to impose no duty on parents of illegitimates. Id. at 615. The plaintiff sought an injunction requiring the local district attorney to prosecute the father of her unsupported, illegitimate child. Id. at 616. The Court held that she lacked standing, because "in the unique context of a criminal statute, appellant has failed to allege a sufficient nexus between her injury and the government action which she attacks." Id. at 617-18.

Linda R. S. turned on the longstanding rule that "a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution." Id. at 619. The plaintiff sought an injunction against a defendant, the local district attorney, who had not directly caused the plaintiff any injury. Id. at 616. As Simon later explained, "[t]he principle of Linda R. S. * * * is that indirectness of injury, while not necessarily fatal to standing, may make it substantially more difficult to meet the minimum requirement of Art. III." 426 U.S. at 44-45 (internal quote marks omitted). The Court noted that "[t]he prospect that prosecution will, at least in the future, result in payment of support can, at best, be termed only speculative," because the requested relief "would result only in the jailing of the child's father." 410 U.S. at 618. Given that the defendant had not directly caused the plaintiff's injuries, and in light of the "special status of criminal prosecutions in our system," the court declined to find standing. 410 U.S. at 619. For, "in American jurisprudence, at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." Id. The Court explicitly limited its holding to "the unique context of a

challenge to a criminal statute," however. Id. at 617. That holding is inapposite to a case, such as the present, where the plaintiff seeks civil penalties directly against the party that injured the plaintiff, to deter future violations by the defendant that would directly injure the plaintiff again.[10]/

10/Any extension of Linda R. S. to a civil enforcement proceeding also runs up against the Supreme Court's post-Steel Company decision in Federal Election Commission v. Akins, 118 S. Ct. 1777 (1998). The Akins Court held that a private citizen who sought information about AIPAC, a political action committee, had standing to challenge the Federal Election Commission's determination not to require AIPAC to comply with certain federal reporting requirements. The Akins plaintiffs sought a declaration that FEC's action was unlawful. Such a declaration might, or might not, have led to reporting by AIPAC, however. Even if on remand the FEC did require the information from AIPAC, AIPAC might not have complied and the FEC would have had to bring an enforcement action to get the information that the plaintiffs sought. Id. at 1786-87. Nevertheless, the Akins Court found standing, implicitly rejecting an argument in the Government's brief that the effect of possible future civil enforcement against AIPAC was too speculative to satisfy the redressability test. See Federal Election Commission, No. 96-1590, U.S. Br. at 29-31 (1997 WL 523890). In the present case, the actual imposition of civil penalties against Vallejo might be expected to have at least as immediate a coercive effect as the mere possibility of civil enforcement found sufficient for redressability in Akins.

Conclusion

For these reasons, Vallejo's motion to dismiss BayKeeper's claims for civil penalties should be denied.

Respectfully submitted,

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Assistant Attorney General

By: _____
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90-12-01140
December 11, 1998

CERTIFICATE OF SERVICE

I hereby certify that, on December 11, 1998, I caused a copy of the BRIEF OF THE UNITED STATES AS AMICUS CURIAE IN RESPONSE TO DISTRICT'S MOTION TO DISMISS PLAINTIFF'S CIVIL PENALTY CLAIMS to be served by Federal Express, postage pre-paid, on:

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No. 98-822

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

FRIENDS OF THE EARTH, et al.,
Petitioners,

v.

LAIDLAW ENVIRONMENTAL SERVICES (TOC), INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

AFFIDAVIT OF BRUCE J. TERRIS

I, Bruce J. Terris, do hereby affirm and state:

1. I am counsel for plaintiffs in the above-captioned case.

2. My staff has obtained the following information relating to the shut down of the incinerator of Laidlaw Environmental Services (TOC), Inc., in Roebuck, South Carolina and other facilities operated by Laidlaw:

(a) The incinerator was shut down in August 1998.

(b) The NPDES permit issued by the State of South Carolina for the discharge of pollutants by the incinerator has not been terminated or withdrawn.

(c) Laidlaw acquired Safety-Kleen in April 1998. Laidlaw changed its name to Safety-Kleen.

(d) Laidlaw/Safety-Kleen operates at least 16 other NPDES permitted facilities in Illinois, Louisiana, Kentucky, Missouri, New Jersey, Virginia and Texas.

(e) Plaintiffs Friends of the Earth and the Sierra Club have members who use the waters affected by Laidlaw/Safety-Kleen's discharges from some of these facilities and their use and enjoyment of these waters is adversely affected by illegal discharges from these facilities.

Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed on January 19, 1999.

BRUCE J. TERRIS

Supreme Court, U.S.
FILED
JAN 15 1999
CLERK

(4)

No. 98-822

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

FRIENDS OF THE EARTH, *et al.*,

Petitioners,

vs.

LAIDLAW ENVIRONMENTAL SERVICES (TOC), INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF *AMICI CURIAE* SOUTH CAROLINA CHAMBER OF COMMERCE, ENVIRONMENTAL MANAGEMENT ASSOCIATION OF SOUTH CAROLINA AND SOUTH CAROLINA MANUFACTURERS ALLIANCE IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether Petitioners lack standing under Article III of the United States Constitution because the only potential relief available to redress their claimed injuries is the civil penalty assessed against Laidlaw and payable to the United States Treasury.

2. Whether Petitioners' failure to obtain relief on the merits of their claims precludes any recovery of attorneys' fees or other litigation costs because such an award is available only to a prevailing or substantially prevailing party under 33 U.S.C.A. § 1365(d) (West Supp. 1998).

3. Whether the citizen suit should have been barred even if the Fourth Circuit had concluded that Petitioners had standing because DHEC had diligently prosecuted Laidlaw.

PARTIES TO THE PROCEEDING

Respondent did not agree that Citizens Local Environmental Action Network, Inc. ("CLEAN") and Sierra Club should be parties in this action. CLEAN and Sierra Club never filed 60-day notice letters and, therefore, should not be parties. 33 U.S.C.A. § 1365(b) (1986).

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INTEREST OF *AMICI CURIAE*[1]

The South Carolina Chamber of Commerce ("Chamber") is comprised of regulated businesses and industries from across the State of South Carolina. The Chamber actively participates in the administrative, regulatory and legislative issues affecting industry in South Carolina. Through its Environmental and Technology Committee, the Chamber comments frequently on environmental policies, guidelines, regulations, and legislative measures that would directly affect the operations of its membership. As such, the Chamber is keenly interested in this appeal and the effect this Court's decision will have on its membership.

The Environmental Management Association of South Carolina ("EMA") is a group of environmental professionals from South Carolina industry that promotes responsible waste management practices to protect the environment. The EMA serves communities and businesses by advising and safeguarding members' and the public's interests through regulatory and legislative incentives, public relations, and educational programs. EMA members have a direct interest in the development of laws under which they are regulated, such as the Federal Water Pollution Control Act, and they are directly affected by these administrative agency regulations and procedures.

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1. Pursuant to Sup. Ct. R. 37.6, Laidlaw Environmental Services, Inc., now known as Safety-Kleen Corp., parent corporation of Respondent, is a member of the South Carolina Chamber of Commerce and the Environmental Management Association of South Carolina and has made a monetary contribution to the preparation and submission of this brief. Deborah Ann Hottel, Counsel for the South Carolina Chamber of Commerce and the South Carolina Manufacturers Alliance, and Virginia Ann Mullikin, Counsel for the Environmental Management Association of South Carolina, are the sole authors of this brief. Letters of consent have been filed with the Clerk of the Court.

The South Carolina Manufacturers Alliance ("SCMA") is a trade association representing South Carolina manufacturers. The primary function of the SCMA is to serve as the manufacturing industry's government liaison. SCMA maintains constant communication with state government agencies on issues of interest to its members. SCMA currently has nine standing committees, including the Environmental Committee, and four divisions. Its 77 member organizations represent over 80,000 employees statewide.

The Chamber, the EMA and the SCMA ("Amici Curiae") recognize the value of citizen suits as an important component of enforcement of the Federal Water Pollution Control Act and believe that they can provide a strong incentive for regulated entities to comply with the Act in furtherance of the Act's principal objective to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C.A. § 1251(a) (1986 and West Supp. 1998). The Amici Curiae, however, oppose a judicial broadening of the Congressional circumscription of these laws which the Petitioners urge. Thus, on behalf of their members, the Amici Curiae submit this joint brief to express the views of their regulated members in support of Respondent Laidlaw Environmental Services (TOC), Inc., now known as Safety-Kleen Roebuck, Inc.

INTRODUCTION

Amici Curiae South Carolina Chamber of Commerce, Environmental Management Association of South Carolina, and South Carolina Manufacturers Alliance respectfully request that this Court deny the Petition for Writ of Certiorari which seeks review of the Fourth Circuit's opinion in this case. That opinion is reported at 149 F.3d 303 (CA4 1998).

OPINIONS BELOW, JURISDICTION, STATUTES INVOLVED AND STATUTORY BACKGROUND

The Petition for Writ of Certiorari accurately sets out the opinions below, the grounds for jurisdiction, the statutes involved and the statutory background.

STATEMENT OF THE CASE

Amici Curiae adopt the Statement of the Case as set forth in the Brief in Opposition of the Respondent.

REASONS FOR DENYING THE PETITION

I.

THE COURT OF APPEALS FOR THE FOURTH CIRCUIT PROPERLY HELD THAT THE PETITIONERS LACK STANDING UNDER ARTICLE III OF THE CONSTITUTION OF THE UNITED STATES.

(Petitioners' Arguments 1, 2, 3, 4, 5 and 6).

In order to have standing, the Petitioners must meet three elements: (1) the Petitioners must have suffered an actual or threatened injury in fact; (2) the injury must have been caused by Laidlaw's conduct; and (3) the injury must be redressable by the relief sought. *Friends of the Earth*, 149 F.3d 303, 306 (CA4 1998). These elements must continue to exist at every stage of review, not merely at the time of filing. Otherwise, the action becomes moot. *Id.*

The Fourth Circuit reasoned that since the Petitioners did not appeal the denial of declaratory and injunctive relief, the *only* relief available was the civil penalty imposed on Laidlaw which would be paid to the United States Treasury. Relying on

Steel Co. v. Citizens For A Better Env't, 523 U.S. 83, 118 S. Ct. 1003 (1998), the Fourth Circuit held that civil penalties payable to the government could not redress any injury the Petitioners may have suffered. Hence, the Fourth Circuit properly vacated the order of the district court and remanded with instructions to dismiss the action.

The Petitioners raise as a reason for granting the Petition that the Fourth Circuit's opinion is directly inconsistent with this Court's opinion in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*, 484 U.S. 49, 108 S. Ct. 376 (1987). Petition for Writ at 8 and 13.

Steel Co. simply held that Article III jurisdiction is always the antecedent question, as Justice O'Connor and Justice Kennedy recognized. In his concurring opinion, Justice Stevens took issue with this statement. As stated in his concurrence, Justice Stevens believes the *Steel Co.* case presents two questions: (1) whether EPCRA confers federal jurisdiction over citizen suits for wholly past violations; and (2), if so, whether respondent has standing under Article III.

Justice Stevens opined that the Court elected to decide the constitutional question first and, in doing so, "has created new constitutional law." *Steel Co.*, 523 U.S. at __, 188 S. Ct. at 1021. Justice Stevens's argument revolves around the question of which issue to decide first. For him, the choice in *Steel Co.* is between two jurisdictional issues, and the Court has routinely held that, when presented with two jurisdictional issues, the Court may choose which one to answer first. In the *Steel Co.* decision, Justice Stevens stated it would have been "prudent to answer the question of statutory construction before announcing new constitutional doctrine" as was the case in *Gwaltney*. The decision in *Gwaltney* stands for the proposition that the Court clearly has the power to decide the statutory question first. *Steel*

Co., 523 U.S. at __, 118 S. Ct. at 1025. Therein lies the problem with the Petitioners' argument in this case.

In their Petition for Writ, the Petitioners repeatedly state that the issue here is not standing as in *Steel Co.*, but mootness as in *Gwaltney*. See Petition for Writ at 11 and 13. However, as the Fourth Circuit aptly stated recently in *Woodlands Ltd. v. Nationsbank, N.A.*, No. 97-1813, 1998 U.S. App. LEXIS 23716 (CA4 Sept. 23, 1998), the doctrine of standing often implicates that of mootness; the three standing elements must exist throughout the pendency of the litigation. Otherwise, the case becomes moot. What Justice Stevens pointed out in his concurrence is that the *Steel Co.* decision has effectively eliminated the opportunity to choose which jurisdictional issue to address first. In *Gwaltney*, the Court addressed the statutory issues first of whether the statute conferred jurisdiction over citizen suits for wholly past violations and whether the allegation of on-going injury sufficed to support jurisdiction. As Justice Stevens states, the fact that the Court did not address standing in *Gwaltney* does not establish that the plaintiffs had standing there. *Steel Co.*, 523 U.S. at __, 118 S. Ct. at 1025. It stands simply for the proposition that regardless of how the Court characterized the issue in *Gwaltney*, the Court had the power to address the statutory issue first, and did. *Steel Co.*, 523 U.S. at __, 118 S. Ct. at 1025.

In *Steel Co.*, the Court said that the Article III standing issue *must* be addressed first.[2] As Justice Stevens states,

2. The Third and Fourth Circuits have adopted the Steel Co. holding by deciding the Article III standing issue first. *See Conte Bros. Auto. v. Quaker State-Slick 50, Inc.*, No. 98-5136, 1998 U.S. App. LEXIS 32595 (CA3 Dec. 30, 1998) (question of Article III standing should be addressed before issues of prudential and statutory standing); *Schurr v. Resorts Int'l Hotel*, 16 F. Supp. 2d 537 (D.N.J. 1998) (federal courts must first (Cont'd)

"[w]hether correct or incorrect, the Court's constitutional holding represents a significant extension of prior case law." 523 U.S. at __, 118 S. Ct. at 1027. This case is a "significant new development in our constitutional jurisprudence." 523 U.S. at __, 118 S. Ct. 1030. The Petitioners herein propose that the Court ignore this new development and continue to decide statutory issues before Article III issues, as was done in *Gwaltney*. That choice no longer exists. When Article III standing ceases to exist, "the only function remaining to the court is that of announcing the fact and dismissing the cause." *Steel Co.*, 523 U.S. 83, __, 118 S. Ct. 1003, 1012.

The Petitioners did not appeal the denial of declaratory and injunctive relief and have as their only relief the civil penalty imposed upon Laidlaw to be paid to the United States Treasury. As Justice Stevens pointed out, although the Court in *Steel Co.* failed to specify why payment to the Respondent would redress Respondent's injuries and why payment to the United States Treasury does not, *Steel Co.* holds that payment of the civil penalty is the only proper relief, and thus, the Fourth Circuit's reliance upon this holding is proper. "Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement." 523 U.S. at __, 118 S. Ct. at 1019. A generalized interest in deterrence is insufficient for purposes of Article III. 523 U.S. at __, 118 S. Ct. at 1019.

We agree with the Respondent that Laidlaw was not brought into compliance in response to litigation. The Petitioners' assertion to the contrary is not accurate. Petitioners

(Cont'd)
squarely address the question of subject matter jurisdiction); *Mixer v. M.K.-Ferguson Co.*, No. 6:98-0326, 1998 U.S. Dist. LEXIS 12801 (W.D.W.V. Aug. 12, 1998) (this term the Supreme Court invalidated the practice of addressing questions on the merits without addressing jurisdictional questions first).

also argue that there is no evidence that makes it absolutely clear that Laidlaw's allegedly wrongful behavior could not be reasonably expected to recur. Petition for Writ at 19. Again, this statement is not accurate. The facility has been in closure since August 1998 pursuant to a consent order entered into with DHEC. As stated by this Court in *Steel Co.*, "[i]t is an immense and unacceptable stretch to call the presumption into service as a substitute for the allegation of present or threatened injury upon which initial standing must be based." 523 U.S. at __, 118 S. Ct. at 1020.

II.

THE FOURTH CIRCUIT PROPERLY DENIED THE PETITIONERS THE RECOVERY OF ATTORNEYS' FEES AND OTHER COSTS.

(Petitioners' Arguments 7 and 8).

In a footnote, the Fourth Circuit ruled that the failure of FOE, *et al.* to obtain relief on the merits of their claims precludes any recovery of attorneys' fees or other litigation costs because such an award is available to only a "prevailing party or substantially prevailing party. 33 U.S.C.A. § 1365(d) (West Supp. 1998)." *Friends of the Earth*, 149 F.3d at 307 n.5.

In response, the Petitioners submit a lengthy argument that the Fourth Circuit decision is "of devastating consequence to citizen suits under the Clean Water Act and other environmental statutes," "is almost certain to lead environmental groups to cease bringing citizen suits," and "will affect the willingness of lawyers to bring not only citizen suits under environmental statutes but suits under civil rights statutes and other statutes where Congress has provided for fee-shifting." Petition for Writ at 26, 27 and 29.

These statements are without merit. If anything, the decision will cause plaintiffs to avoid pursuing citizen suits in instances where the violation has resulted in no harm to the environment and the state has "diligently prosecuted" the violation. Members of the bar should properly evaluate the case before them to determine if the state has "diligently prosecuted" and, if so, refrain from incurring millions of dollars in attorneys' fees at the expense of their citizen-plaintiffs pursuing a case that should not be brought in the first instance. This holding by no means should discourage plaintiffs from properly bringing citizen suits in those instances where diligent prosecution has not occurred — the sole purpose of the citizen-suit provision of the Federal Water Pollution Control Act. The Fourth Circuit indirectly has held true to the dictates of 33 U.S.C.A. § 1365(b)(1)(B) and correctly applied the holding in *Steel Co.* Indeed, an interest in attorneys' fees is insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim. 523 U.S. at __, 118 S. Ct. at 1019.

Having reviewed the Petitioners' argument and underlying authorities, the Amici Curiae in accordance with Sup. Ct. R. 37.1 can bring to the attention of this Court no further relevant material not already brought to the attention of this Court by the Respondent in its Brief in Opposition. Therefore, Amici Curiae support in its entirety the argument made by the Respondent.

III.

THE DISTRICT COURT ERRED IN FAILING TO BAR THE CITIZEN SUIT DUE TO DILIGENT PROSECUTION BY DHEC.

FOE, *et al.*, appealed the order of the district court arguing that the district court abused its discretion by imposing an inadequate penalty. Laidlaw cross appealed claiming that FOE,

et al. lacked standing to institute this action because they suffered no injury in fact and that

> this suit should have been barred because the South Carolina Department of Health and Environmental Control (DHEC) diligently prosecuted a prior action regarding the same violations. See 33 U.S.C.A. § 1365(b)(1)(B).

Friends of the Earth, 149 F.3d 303, 305 (CA4 1998).[3] Although the Fourth Circuit concluded that the action was moot for lack of standing and, therefore, did not address the diligent prosecution issue in its decision, the Amici Curiae remain concerned about the district court's conclusion. Even if the Fourth Circuit had concluded that the Petitioners had standing, the district court erred in failing to bar the citizen suit and in ruling that DHEC had not diligently prosecuted Laidlaw within the meaning of Section 1365(b)(1)(B) for the following reasons.

This Court has recognized that agencies administering the Federal Water Pollution Control Act are to be given significant discretion and has outlined the role of citizen suits.

> The bar on citizen suits when governmental enforcement action is under way suggests that the citizen suit is meant to supplement rather than to supplant governmental action. The legislative history of the Act reinforces this view of the role of the citizen suit. The Senate Report noted that "[t]he Committee intends the great volume of enforcement

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3. Section 1365(b)(1)(B) provides that a citizen suit under the Federal Water Pollution Control Act may not be commenced when the "State has commenced and is diligently prosecuting a civil . . . action in a court of the . . . State to require compliance." 33 U.S.C.A. § 1365(b)(1)(B) (1986).

> actions [to] be brought by the State," and that citizen suits are proper only "if the Federal, State, and local agencies *fail to exercise* their enforcement responsibility."

Gwaltney, 484 U.S. 49, 60, 108 S. Ct. 376, 383 (1987) (quoting S. Rep. No. 92-414, p. 64 (1971) reprinted in 2 A Legislative History of the Water Pollution Control Act Amendments of 1972, p. 1482 (1973) (emphasis added)). The 1987 amendments to the Federal Water Pollution Control Act reflect a shift of enforcement emphasis to the state agencies. *Connecticut Coastal Fishermen's Association v. Remington Arms Co.*, 777 F. Supp. 173, 177 (D. Conn. 1991) (citing Frank P. Grad, *Treatise on Environmental Law*, 3-303). States are afforded some latitude in selecting the specific mechanisms of their enforcement program in that the state agency must be given great deference to proceed in a manner it considers in the best interests of all the parties involved. *Arkansas Wildlife Federation v. ICI Americas, Inc.*, 842 F. Supp. 1140, 1147 (E.D. Ark. 1993), *aff'd*, 29 F.3d 376 (CA8 1994), *cert. denied*, 513 U.S. 1147, 115 S. Ct. 1094 (1995). Citizen suits are to "ignite agency enforcement" and to act as an "*alternative* enforcement mechanism *absent* agency enforcement." *Connecticut Fund for Env't v. Upjohn Co.*, 660 F. Supp. 1397, 1403 (D. Conn. 1987) (emphasis added). Thus, unless the state has failed or declined to take action, a citizen suit is not authorized. *USEPA v. City of Green Forest*, 921 F.2d 1394, 1405 (CA8 1990); *see North and South Rivers Watershed Assn. v. Scituate*, 949 F.2d 552, 557 (CA1 1991); *see also Remington Arms*, 777 F. Supp. at 179.

An analysis of whether or not "diligent prosecution" has taken place does not encompass *de novo* assessment of whether the agency's procedure in seeking enforcement and computing sanctions conforms to those that the citizen group or the court

wishes to impose. *See Gwaltney*, 484 U.S. 49, 61, 108 S. Ct. 376, 383 (1987); *Atlantic States Legal Foundation v. Eastman Kodak Co.*, 933 F.2d 124, 127 (CA2 1991).

In order to overcome the presumption of DHEC's diligent prosecution, the Petitioners were required to show that the actions by DHEC amounted to inaction. *See Gwaltney*, 484 U.S. at 60, 108 S. Ct. at 383; *see also Scituate*, 949 F.2d at 555.

In this case, Laidlaw paid a substantial penalty, expended over a million dollars in upgrading its system, and complied with its NPDES permit as a result of DHEC's enforcement action. A citizen suit to visit the identical issues, absent fraud or collusion, is inappropriate.[4] *Scituate*, 949 F.2d at 556.

Moreover, the First Circuit has held that diligent prosecution by a state agency does *not* require assessing any penalty at all. In *Scituate*, the First Circuit rejected the plaintiff's argument that for the state agency's action to be considered "diligently prosecuted" a penalty must be assessed. Such an interpretation would enable citizen suits to expand the "*supplemental*" role envisioned for citizen suits and create a potentially intrusive role for citizens. *Scituate*, 949 F.2d at 556, 558 (citing *Gwaltney*). "Diligence" is the act of remedying the violations. *Scituate*, 949 F.2d at 558. The mere fact that the state does not take the precise action plaintiffs desire does not constitute lack of diligence. *Id.* at 558.

The district court in the instant case essentially substituted its judgment for that of DHEC in determining what the penalty should be, thereby allowing the citizen suit to *supplant* rather than *supplement* the government action. DHEC's enforcement action brought Laidlaw into full compliance, assured that no

4. The district court found that the action between DHEC and Laidlaw was *not* the product of fraud or collusion. (JA 89).

harm to the environment occurred, and resulted in a substantial monetary penalty. The actions of DHEC were diligent in remedying the noncompliance and DHEC did not fail " 'to exercise [its] enforcement responsibility.' " *Gwaltney*, 484 U.S. at 60, 108 S. Ct. 383.

A citizen suit may not be brought merely to obtain penalties and attorneys' fees when the agency has already remedied the problem causing the violations.[5] *Id.*; *City of Green Forest*, 921 F.2d at 1405.

Citizens suing under the Federal Water Pollution Control Act are "private attorneys general"; thus, there is little left to be done after the government has negotiated an agreement. *City of Green Forest*, 921 F.2d at 1405. Penalties recoverable under the Act are payable to the United States Treasury and are not recovered by the aggrieved citizens. *Id.* While a citizen may be dissatisfied with an agency's ultimate resolution, the filing of a citizen suit due to dissatisfaction would impinge on the authority and autonomy of the federal and state agencies. *Remington Arms*, 776 F. Supp. at 179; *see generally Harmon Industries, Inc. v. Browner*, 19 F. Supp. 2d 988 (W.D. Mo. 1998) (in case of first impression under Resource Conservation and Recovery Act, court held that EPA did not have the authority to impose its own separate penalties after an industry negotiates a consent decree with the authorized state agency and that settlement is approved by an appropriate state authority; were

5. The Second Circuit was faced with a similar issue in *Atlantic States Legal Foundation v. Eastman Kodak*, 933 F.2d 124 (CA2 1991). The Court held that a citizen suit cannot proceed when its actual purpose is to challenge the terms of a settlement reached by state officials where the settlement reasonably assures that the alleged violations have ceased and will not recur. This holding is based upon the fact that a citizen suit is to stop violations of the Federal Water Pollution Control Act and not to challenge the appropriate state and federal authorities. *Id.* at 127.

it otherwise, none of the state's powers would ever have the same force and effect because the EPA could modify, by piecemeal measures, any action taken by the states).

This Court has recognized that judicial involvement might ultimately discourage out of court settlements between agencies and regulated entities, since an incentive to settle would be diminished if subsequent citizen suits were allowed. *Gwaltney*, 484 U.S. at 60-61, 108 S. Ct. at 383. Given the history of the Federal Water Pollution Control Act, this could not have been the Congressional intent. *Id.*

By enacting the Water Pollution Control Act, Congress envisioned a partnership where states would assist in the protection of the Nation's waterways. *See Mianus River Preservation Comm. v. Envt'l Protection Agency*, 541 F.2d 899 (CA2 1976). South Carolina has dedicated vast resources, time and thoughtful study to implement these programs — programs upon which South Carolina industry has a right to rely.

Duplicative actions aimed at exacting financial penalties in the name of environmental protection do not further the goal of the Federal Water Pollution Control Act to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. 33 U.S.C.A. § 1251(a) (1986).

If DHEC's discretionary penalty assessment procedure were not upheld as adequate, and, therefore, as diligent prosecution, the business community is concerned that virtually every DHEC enforcement action could be followed by a citizen suit alleging nondiligent prosecution on the part of the state, thereby changing the citizens' role from "interstitial to potentially intrusive." *Gwaltney*, 484 U.S. at 61, 108 S. Ct. at 383. This concern is especially accurate in instances where a citizen group disagrees with the penalty set by the state. *See*

generally Harmon Industries, Inc., 19 F. Supp. 2d 988, 996 (1998) (RCRA gives EPA only the option of withdrawing authorization of a state program that fails to enforce the program, not the option to reject part of a program because EPA believes the penalty to be inadequate. "Certainly, such a schizophrenic approach to enforcement of RCRA would result in uncertainty in the public mind.").

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari of Friends of the Earth, *et al.* should be denied.

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MOTION FILED
JAN 1 5 1999

No. 98-822

IN THE
Supreme Court of the United States

OCTOBER TERM, 1998

FRIENDS OF THE EARTH, et al.,
Petitioners,

v.

LAIDLAW ENVIRONMENTAL SERVICES (TOC), INC.,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* PUBLIC CITIZEN IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Public Citizen seeks leave to file the attached brief *amicus curiae* in support of the petition for a writ of certiorari. The petition seeks review of a decision of the Fourth Circuit which, based on its interpretation of this Court's decision in *Steel Co. v Citizens for a Better Environment*, 118 S. Ct. 1003 (1998), dismissed as moot an appeal of a civil penalty awarded in a citizen suit arising under the Clean Water Act. The Fourth Circuit also set aside an award of attorneys' fees, even though plaintiffs had indisputedly caused respondent Laidlaw to halt its continuing violations of the Clean Water Act through successful prosecution of the lawsuit. In direct conflict with ten other federal courts of appeals, the Fourth Circuit forbids an award of attorneys' fees in statutory fee-shifting cases on a "catalyst" theory. The Fourth Circuit's rule is also out of line with this Court's attorneys' fees jurisprudence.

Public Citizen is a non-profit, consumer advocacy organization with nearly 150,000 members nationwide. Since 1971, Public Citizen has been active in the courts, in Congress, and before regulatory agencies concerning the enforcement of a wide-range of health and safety, environmental, and other consumer legislation. Public Citizen has represented plaintiffs in litigation over federal fee-shifting statutes in environmental and other cases. *See Melkonyan v. Sullivan*, 501 U.S. 89 (1991); *Jones v. Brown*, 41 F.3d 634 (Fed. Cir. 1994); *Chesapeake Bay Foundation v. United States Dep't of Agriculture*, 11 F.3d 211 (D.C. Cir. 1993), *cert denied*, 115 S. Ct. 315 (1994); *Dunn v. Florida Bar*, 889 F.2d 1010 (11th Cir. 1989), *cert. denied*, 498 U.S. 811 (1990). Public Citizen also served as counsel on the petition for certiorari from the *en banc*

Fourth Circuit decision holding that a fee award under a catalyst theory is never permissible. *See S-1 & S-2 v. State Bd. of Educ.*, 21 F.3d 49, 51 (4th Cir.), *cert. denied*, 513 U.S. 876 (1994). In all of these cases, Public Citizen has sought to further the policies behind federal fee-shifting legislation: providing a means for ordinary citizens, who otherwise could not afford counsel, to enforce the mandates of federal law.

The petition presents three questions for review: two on the merits and the third concerning attorneys' fees. *Amicus* agrees with petitioners that review should be granted on all of the questions presented. However, Public Citizen confines this brief to why, even if certiorari is not granted on the first two questions, the Court should grant certiorari on the third question concerning attorneys' fees. *First*, the Fourth Circuit's rule against catalyst fee awards is inconsistent with decisions of this Court defining "prevailing party" status. *See Texas State Teacher's Ass'n v. Garland Indep. School Dist.*, 489 U.S. 782 (1989); *Hewitt v. Helms*, 482 U.S. 755, 761 (1986); *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983); *Maher v. Gagne*, 448 U.S. 122, 129 (1980). *Second*, the Fourth Circuit's rule is in direct conflict with decisions of ten courts of appeals holding that statutory fees may be awarded under a "catalyst" theory. *Third*, certiorari should be granted to ensure the uniform and just application of federal law. The Fourth Circuit's rule against catalyst fee awards places a significant obstacle to citizens living in Maryland, Virginia, North Carolina, and South Carolina seeking to use the "private attorney general" fee provisions to enforce federal laws as Congress intended. Because the accompanying *amicus* brief focuses on the question of why certiorari should be granted on the third question, and no other party or *amici* is likely to emphasize that issue, we ask that Public Citizen be granted leave to file the accompanying brief. Petitioners consent to the filing of this brief but respondent

Laidlaw opposes.

Respectfully submitted,

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BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

INTEREST OF AMICUS

The interest of *amicus* Public Citizen is set out in the foregoing motion for leave to file this brief *amicus curiae*.[1]

STATUTORY BACKGROUND

The relevant provisions of the Clean Water Act, 33 U.S.C. §§ 1251, *et seq.*, are set forth in the petition at pages 2-3 and in the petition's appendix at 10a. Section 505(a) of the Clean Water Act, 33 U.S.C. § 1365(a), authorizes any citizen to bring suit to enforce certain violations of the Act. That section specifically empowers the courts to issue injunctive relief and impose civil penalties. The Clean Water Act provides that the court may award attorneys' fees and costs "to any prevailing or substantially prevailing party." 33 U.S.C. § 1365(d). The attorneys' fee provision in the Act is similar to that in dozens of other federal environmental, consumer, and civil rights statutes.

STATEMENT OF THE CASE

This case involves the successful efforts of three citizen groups to force respondent Laidlaw, operator of a hazardous waste incinerator, into compliance with the limits for discharge

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[1] Pursuant to Supreme Court Rule 37.6, Public Citizen states that no counsel for a party has authored this brief in whole or in part, and that no person or entity other than Public Citizen has made a monetary contribution to the preparation or submission of this brief.

of specified pollutants in its Natural Pollutant Discharge Elimination System ("NPDES") permit. The Clean Water Act prohibits the discharge of any pollutant by any person unless discharge is in compliance with a permit issued pursuant to one of the permit programs established by the Act. Section 402(a) of the Clean Water Act, 33 U.S.C. § 1342(a), provides for the issuance of NPDES permits to allow the discharge of wastewater. Each permit includes limits on discharge and requires that the permittee monitor and report its compliance with these limits. *Id.* In this case, Laidlaw violated its permit hundreds of times before plaintiffs filed suit, discharging mercury, lead, nickel, arsenic, cadmium, chromium, and zinc into the North Tyger River. *Friends of the Earth, Inc., et al., v. Laidlaw Enviro. Services*, 956 F. Supp. 588, 593 (D.S.C. 1997). The cause of the discharge violations was an inadequate wastewater treatment system and Laidlaw's failure to adequately control mercury in its operations. *Friends of the Earth, Inc., et al., v. Laidlaw Enviro. Services*, 890 F. Supp. 470, 478 (D.S.C. 1995).

The procedural history of the case is set forth in detail in the Petition for a Writ of Certiorari at pages 3-7. For the purposes of this brief, only a few key facts are relevant.

First, Laidlaw continually violated its permits for a six-year period preceding, and for many months following, plaintiffs' initiation of this action. 956 F. Supp. at 613-21. During the six-month period prior to the suit, Laidlaw violated its mercury limits 103 times, including violations as much as 13 times over its permit limit. 890 F. Supp. at 619-21.

Second, only after plaintiffs filed suit did Laidlaw take steps to install the proper filters and equipment to control its illegal discharges. In July 1992, a month after plaintiffs filed

suit, Laidlaw installed new carbon absorption equipment. 890 F. Supp. at 483. Six months later, Laidlaw installed additional equipment that aided the performance of the carbon filters in removing mercury. *Id.* As a result, the number and severity of its mercury violations dropped though there were still 13 violations after the complaint was filed. 956 F. Supp. at 621.

Third, after numerous pre-trial proceedings, the district court conducted a three-day trial in July and August 1995 on liability and relief. 956 F. Supp. at 592. In January 1997, the district court entered judgment for plaintiffs, assessing a penalty of $405,800 (payable to the U.S. Treasury) against Laidlaw, and awarding plaintiffs their attorneys' fees and costs. *Id.* at 610-11. The district court concluded that, since Laidlaw had by that time achieved substantial compliance with its permit, there was no need for an injunction, but that Laidlaw's penalties and payment of costs would be sufficient deterrents to prevent Laidlaw from violating its permit in the future. *Id.*

Fourth, the Fourth Circuit dismissed the appeal and remanded with directions to dismiss the case as moot based on this Court's decision in *Steel Co.* *See* Petition at App. 8a-9a. The court of appeals held that, because plaintiffs had not appealed the denial of injunctive relief, and the penalty award could not redress any injury suffered by plaintiffs, plaintiffs no longer had standing. *Id.* at 7a. Significantly, the court of appeals held that it could not award plaintiffs their attorneys' fees and costs because the law of the Fourth Circuit specifically forbids an award of fees under a "catalyst" theory. *Id.* at 9a n.5.

Thus, although plaintiffs were successful in forcing Laidlaw to comply with its Clean Water Act permit after years of violations and performed precisely the role Congress intended

citizens to serve under the Clean Water Act, in the end no penalties were assessed, and plaintiffs were denied their fees and costs incurred over six years of vigorous litigation, including numerous pre-trial motions, a three-day trial, and appeals.

REASONS FOR GRANTING THE WRIT

The Fourth Circuit's categorical rejection of the well-established and widely-accepted "catalyst" theory misreads the language and history of the statutes awarding fees to "prevailing parties," contravenes this Court's endorsement of "catalyst" theory in a series of cases, and conflicts with the interpretation of the "prevailing party" language adopted by every other court of appeals to consider the issue. The Fourth Circuit's narrow interpretation of the "prevailing party" language was first announced in *S-1 and S-2 v. State Board of Educ.*, 21 F.3d 49 (*en banc*) (interpreting the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988 ("Section 1988")), *cert. denied*, 513 U.S. 876 (1994). Later that same year, the "no catalyst" rule was applied in another Section 1988 case, *Clark v. Sims*, 28 F.3d 420 (4th Cir. 1994), and most recently was extended to this case arising under the Clean Water Act. The Fourth Circuit's rule dramatically narrows the grounds for fee awards to plaintiffs seeking to vindicate federal civil rights or enforce federal environmental or consumer statutes. There is nothing in this Court's cases, including its decision in *Farrar v. Hobby*, 506 U.S. 103 (1992), that warrants the Fourth Circuit's restrictive view of the term "prevailing party."

The divergence between the Fourth Circuit and the decisions of this Court, and the split between the Fourth Circuit and the ten other courts of appeals, are sufficient reasons to warrant a grant of certiorari, but there is an additional reason why certiorari should be granted. This case is exceptionally

important to the just and uniform administration of federal law. The Fourth Circuit's application of its "no catalyst" rule for attorney's fees places an enormous obstacle to ordinary citizens seeking access to justice and enforcing federal statutory rights. There are over 100 federal fee shifting statutes, all of which predicate an award of fees on some degree of success by the plaintiffs. *See Marek v. Chesney*, 473 U.S. 1, 43-51 (1985) (appendix listing federal statutes authorizing award of attorneys' fees); *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 684 (1983) (Clean Air Act); *see also Ramos v. Lamm*, 539 F. Supp. 730, 755-57 (D. Colo. 1982) (table). The rationale underlying these "citizen suit" statutes is essentially the same -- to enable those who have been wronged to seek redress and to encourage the vindication of federal policy by authorizing "private attorney generals." *See Evans v. Jeff D.*, 475 U.S. 717, 741 (1986) (Section 1988 gives "victims of civil rights violations a powerful weapon that improves their ability to employ counsel, to obtain access to the courts and therefore to vindicate their rights"); *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968) (Title II of 1964 Civil Rights Act); *see also Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co.*, 933 F.2d 124, 127 (2d Cir. 1991) (Clean Water Act). Without the possibility of a fee award after a successful suit, citizens seeking to enforce their statutory rights will have a difficult time retaining counsel and these rights will exist in name only -- out of reach to citizens. *See* H.R. Rep. No. 1558, 94th Cong. 2d Sess. 1-3 (1976) (report accompanying enactment of Section 1988).

I. THE FOURTH CIRCUIT'S "NO CATALYST" RULE CONTRAVENES THE DECISIONS OF THIS COURT.

This Court has in a number of cases endorsed the "catalyst" theory of attorneys' fee awards by recognizing that a final judgment on the merits is not a necessary prerequisite to achieving the status of a "prevailing party." For instance, in *Hewitt v. Helms*, 482 U.S. 755 (1987), the Court expressly acknowledged a "catalyst" theory under Section 1988. "It is settled law, of course, that relief need not be judicially decreed in order to justify a fee award under section 1988." *Id.* at 761. As if to reject the very theory later adopted by the Fourth Circuit, the Court further noted that, "[a] lawsuit sometimes produces voluntary action by the defendant that affords the plaintiff all or some of the relief he sought through a judgment -- *e.g.*, a monetary settlement or a change in conduct that redresses the plaintiff's grievances. When that occurs, the plaintiff is deemed to have prevailed despite the absence of a formal judgment in his favor." *Id.* at 760-61. After all, what one seeks in a lawsuit is not a judicial pronouncement for its own sake but to change the behavior of the defendant in some way. *Id.* Thus, "if a defendant, under pressure of the lawsuit, alters his conduct (or threatened conduct) towards the plaintiff that was the basis for the suit, the plaintiff will have prevailed." *Id.*

Similarly, in *Maher v. Gagne*, 448 U.S. 122 (1980), the Court stated that "[n]othing in the language of section 1988 conditions the district court's power to award fees on full litigation of the issues or on a judicial determination that the plaintiff's rights have been violated." *Id.* at 129. Rejecting the argument that a settlement -- without a judgment on the merits -- cannot afford "prevailing party" status under section 1988, *Maher* quoted a passage of the Senate Report accompanying the

enactment of section 1988. *See id.* ("[F]or purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief.") (quoting S. Rep. No. 1011, 94th Cong., 2d Sess. 5 (1976)). *See also Hanrahan v. Hampton*, 446 U.S. 754, 756-57 (1979) (per curiam) (recognizing, in reliance on the legislative reports, that a person may "in some circumstances be a 'prevailing party' " if his rights are vindicated "without formally obtaining relief"); *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (prevailing party if "she succeeds on any significant issue in litigation which achieved some of the benefit the parties sought in bringing suit").[2]

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[2] The House Report accompanying Section 1988 explicitly endorses treating cases in which a defendant's "voluntary compliance" affords plaintiffs the requested remedy no differently than cases in which the plaintiffs obtain relief through a favorable judgment on the merits, a settlement, or a consent decree.

> The phrase "prevailing party" is not intended to be limited to the victor only after entry of a final judgment following a full trial on the merits . . . . If the litigation terminated by consent decree, for example, it would be proper to award counsel fees [citations omitted]. A "prevailing party" should not be penalized for seeking an out-of-court settlement, thus helping to lessen docket congestion. Similarly, after a complaint is filed a defendant might voluntarily cease the unlawful practice. A court should still award fees even though it might conclude, as a matter of equity that no formal relief, such as an injunction, is needed.

(continued...)

Despite this Court's decisions on "prevailing party" status, all of which endorse the "catalyst" theory, the Fourth Circuit derives a contrary rule from this Court's decision in *Farrar v. Hobby*, 506 U.S. 103 (1992). But *Farrar* is not to the contrary. In fact, the Court in *Farrar* did not consider or rule on the validity of the "catalyst" theory. Rather, the issue in *Farrar* was whether a fee award of $280,000 was reasonable, assuming the plaintiff had technically prevailed through an award of $1 in a suit seeking $17 million. In the course of a general discussion on fee awards under Section 1988, the Court stated that, to be a prevailing party, a "plaintiff must obtain at least some relief on the merits of his claim," an "enforceable judgment against the defendant," or "comparable relief through a consent decree or settlement." *Id.* at 111. Citing to the test articulated in *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792 (1989), the Court explained that a "plaintiff prevails when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." 506 U.S. at 111.

The Fourth Circuit incorrectly construed the comments

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[2](...continued)
H.R. Rep. No. 1558, 94th Cong., 2d Sess. 7 (1976). The legislative materials accompanying the 1987 amendments to the Clean Water Act similarly support the view that a "prevailing party" is one who settles the case as surely as one who litigates to judgment. *See* Petition for Certiorari at 22 (citing S. Rep. No. 50, 99th Cong., 1st Sess 33 (1985); S. Rep. No. 233, 98th Cong., 1st Sess. 24-25 (1983)). Congress's only concern was that parties who lost not receive fee awards. *Id; see also Ruckelshaus*, 463 U.S. at 682.

in *Farrar* about obtaining relief through an enforceable judgment, consent decree, or settlement as an exhaustive list, foreclosing the possibility of a fee award where the plaintiff achieves relief through voluntary compliance by the defendant. Writing for a one-vote *en banc* majority in *S-1 and S-2*, Judge Wilkinson held that a "prevailing party" must achieve success by virtue of "a court's authority," and not by any other means. 21 F.3d at 51. Nothing in *Farrar*'s holding suggests that prevailing party status may not be achieved in other ways and, in fact, the context makes clear that the list in *Farrar* is not exclusive and that the core inquiry remains the one articulated in *Texas State Teachers, Hewitt,* and *Hensley* -- alteration of the legal relationship between a plaintiff and a defendant in a way that directly benefits the plaintiff. 506 U.S. at 111. As the Third and Seventh Circuit have noted, "it is not likely that the Supreme Court would overturn such a widespread theory without even once mentioning it, particularly when it was inapplicable to the case at hand." *Baumgartner v. Harrisburg Housing Authority*, 21 F.3d 541, 546-50 (3d Cir. 1994); *see also Zinn by Blankenship v. Shalala*, 35 F.3d 273, 274-76 (7th Cir. 1994). In sum, the decision in *Farrar* cannot be read to foreclose a catalyst theory of fee recovery.

II. THE FOURTH CIRCUIT'S "NO CATALYST" RULE CONFLICTS WITH DECISIONS OF TEN OTHER COURTS OF APPEALS.

Ten other courts of appeals have, post-*Farrar*, confirmed the vitality of the "catalyst" theory of recovery. *Compare S-1 and S-2*, 21 F.3d at 51 *with Comfort Lake Ass'n, Inc. v. Dresel Contracting, Inc.*, 138 F.3d 351, 357-58 (8th Cir. 1998) (Clean Water Act); *Maduka v. Meissner*, 114 F.3d 1240, 1241 (D.C. Cir. 1997) (Equal Access to Justice Act ("EAJA")); *Marbley v. Bane*, 57 F.3d 224, 233-35 (2d Cir. 1994) (Section

1988); *Kilgour v. City of Pasadena*, 53 F.3d 1007, 1010-11 (9th Cir. 1995) (Section 1988); *Zinn by Blankenship v. Shalala*, 35 F.3d 273, 274-76 (7th Cir. 1994) (Section 1988); *Beard v. Tedska*, 31 F.3d 942, 950-52 (10th Cir. 1994) (Individuals with Disabilities Educational Act); *Baumgartner v. Harrisburg Housing Authority*, 21 F.3d 541, 546-50 (3d Cir. 1994) (Section 1988); *American Council for the Blind of Colorado, Inc. v. Romer*, 992 F.2d 249, 250-51 (10th Cir.)(Section 1988), *cert. denied*, 510 U.S. 864 (1993); *Craig v. Gregg County, Texas*, 988 F.2d 18, 20-21 (5th Cir. 1993) (Voting Rights Act); *Paris v. United States Dep't of Housing and Urban Development*, 988 F.2d 236, 238 (1st Cir. 1993) (EAJA and Fair Housing Act); *Citizens Against Tax Waste v. Westerville City School*, 985 F.2d 255, 257-58 (6th Cir. 1993) (Section 1988); *Pembroke v. Wood County, Texas*, 981 F.2d 225, 231 n.27 (5th Cir.) (Section 1988), *cert. denied*, 508 U.S. 973 (1993). Most of these cases explicitly reject the argument accepted by the Fourth Circuit in *S-1 and S-2*, and the decision below, that *Farrar* overruled *sub silentio* the prior decisions of this Court and the law of the circuits that embrace the catalyst theory of recovery.

These cases all emphasize that the key question is one of causation, *i.e.* whether the suit caused the defendant to change its conduct to the plaintiff's benefit, rather than the form by which defendant's compliance takes place. *See, e.g., Public Citizen Health Research Group v. Young*, 909 F.2d 546, 550 (D.C. Cir. 1990); *Nadeau v. Helgemoe*, 581 F.2d 275 (1st Cir. 1978). Once the conditions of causation and substantial benefit to the plaintiff are satisfied, there is no need for the additional requirement that there be a favorable judgment, or that the change in conduct or law be judicially mandated or formalized by judicial decree. Thus, in *Baumgartner*, the Third Circuit explained that "if a plaintiff already has achieved what is sought through litigation, there is no need for a judgment to enforce

that which has been achieved, particularly when there is no possibility that there will be any need for enforcement in the future." 21 F.3d at 547. "[I]f defendants could deprive plaintiffs of attorneys' fees by unilaterally mooting the underlying case by conceding to plaintiffs' demands, attorneys might be more hesitant about bringing ... these civil rights suits, a result inconsistent with Congress's intent in enacting section 1988." *Id; accord Zinn*, 35 F.3d at 274-76. Courts award statutory fees in cases even where the merits of the claims are moot. *See Jean v. Nelson*, 863 F.2d 759, 766, *aff'd*, 496 U.S. 154 (1988) (EAJA); *Little Rock School Dist. v. Pulaski County Special Sch. Dist. No. 1*, 17 F.3d 260, 262 (8th Cir. 1994) (Section 1988); *Collins v. Romer*, 962 F.2d 1508, 1513 (10th Cir. 1992) (Section 1988); *Morscott, Inc. v. City of Cleveland*, 936 F.2d 271, 272-73 (6th Cir. 1991) (same). Environmental fee-shifting cases have typically followed this approach. *See, e.g., Environmental Defense Fund v. Reilly*, 1 F.3d 1254, 1257-58 (D.C. Cir. 1993) (Resource Conservation and Recovery Act). Thus, a plaintiff may be a prevailing party in the absence of a judicial determination on the merits. *See, e.g., Wilderness Society v. Babbitt*, 5 F.3d 383, 386 (9th Cir. 1993) (EAJA); *Atlantic States Legal Foundation*, 933 F.2d at 128 (Clean Water Act).

Under the Fourth Circuit's prohibition on "catalyst" fee awards, however, plaintiffs are deprived of any award of attorneys' fees even though they would be entitled to such a fee award virtually everywhere else in the country. Thus, citizens of the four states within the Fourth Circuit are significantly circumscribed in their ability to take advantage of the fee shifting provisions under federal civil rights, environmental, and consumer statutes by comparison with citizens of the other states. In the context of the Clean Water Act, the conflict becomes even more striking and unfair: Pennsylvania citizens

living along a river that crosses from Pennsylvania into Maryland may recover the costs incurred for suing to abate water pollution although Maryland citizens, perhaps only a few miles away, may not. Assuring uniformity on the standard for awarding statutory fees in lawsuits that are brought across the country is critical to guaranteeing equal application of the law.

III. THE FOURTH CIRCUIT'S "NO CATALYST" RULE IMPAIRS ENFORCEMENT OF FEDERAL CIVIL RIGHTS, ENVIRONMENTAL, AND CONSUMER STATUTES.

The Fourth Circuit's rule that attorneys' fees may never be awarded under a catalyst theory makes more difficult enforcement of federal environmental, consumer and civil rights statutes using the "private attorney general" provisions. Time and time again, Congress has recognized that, without the means to retain counsel and mount a successful prosecution of a citizen suit, there will likely be substantial underenforcement of federal statutory mandates. The fee-shifting provisions in civil rights and environmental statutes serve similar purposes. "Section 1988 was enacted to insure that private citizens have a meaningful opportunity to vindicate their rights protected by the Civil Rights Acts." *Pennsylvania, et al., v. Delaware Valley Citizens Council for Clean Air, et al.*, 478 U.S. 546, 559 (1986) (citing *Hensley*, 461 U.S. at 429). Unless reasonable attorney's fees can be awarded for bring civil rights actions, many legitimate claims will not be redressed. *Id.* at 560. Citizens who bring actions to abate pollution perform a public service and "in such instances the courts should award costs of litigation to such party." *Id.*

The Fourth Circuit's rule significantly circumscribes the availability of attorneys' fees under federal fee shifting statutes,

and contravenes Congress's intent by depriving many deserving litigants of fees despite their success in vindicating federal statutes. If the Fourth Circuit's rule is allowed to stand, it will virtually assure that fewer citizen suits -- either under the civil rights statutes or the environmental statutes -- will be brought in that circuit. Combined with the Fourth Circuit's holding that a defendant may moot out the entire complaint, including an assessment of civil penalties, by dragging out the case until it brings itself into compliance, and the enormous expense involved in litigating these cases to a successful resolution, citizen groups will not be able to find attorneys able to muster the financial resources to bring these cases contrary to Congress's manifest intent..

CONCLUSION

The petition for a writ of certiorari should be granted. Although granting certiorari on all three questions presented by petitioner would be appropriate, even if the Court is not inclined to grant certiorari on the first two merits question, *amicus* urges the Court to grant certiorari on the third question to settle the conflict in the circuits over the award of attorneys' fees under a "catalyst" theory.

Respectfully submitted,

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No. 98-822 (6)

Supreme Court, U.S.
FILED
JAN 15 1999
CLERK

In The

Supreme Court of the United States

October Term, 1998

FRIENDS OF THE EARTH, *et al.*,

Petitioners,

v.

LAIDLAW ENVIRONMENTAL SERVICES (TOC), INC.,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

AMICUS BRIEF OF NATURAL RESOURCES DEFENSE COUNCIL, INC., CLEAN WATER ACTION, INC., AMERICAN LITTORAL SOCIETY, DELAWARE RIVERKEEPER NETWORK, CITIZENS FOR A BETTER ENVIRONMENT, DELTA KEEPER, A PROJECT OF THE SAN FRANCISCO BAYKEEPER, CALIFORNIA PUBLIC INTEREST RESEARCH GROUP, FLORIDA PUBLIC INTEREST RESEARCH GROUP, ILLINOIS PUBLIC INTEREST RESEARCH GROUP, MASSACHUSETTS PUBLIC INTEREST RESEARCH GROUP, PUBLIC INTEREST RESEARCH GROUP IN MICHIGAN, PUBLIC INTEREST RESEARCH GROUP OF NEW JERSEY, OHIO PUBLIC INTEREST RESEARCH GROUP, OREGON STATE PUBLIC INTEREST RESEARCH GROUP, AND WASHINGTON PUBLIC INTEREST RESEARCH GROUP IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTERESTS OF AMICI

Amici parties are not-for-profit public interest organizations working to protect the environment.[1] Amici's work includes influencing environmental legislation, persuading policy makers to provide greater environmental protection, and conducting research into environmental problems. Amici agree with Justice Brennan, however, that in the end "enforcement of the law is what really counts." *Evans v. Jeff D.*, 475 U.S. 717, 743 (1986) (Brennan, J., dissenting). Accordingly, amici parties regularly employ the citizen suit provisions of environmental laws (such as the Clean Water Act (CWA)) to enforce those laws. This central function of the amici parties is threatened by the Fourth Circuit's decision in this case.

SUMMARY OF ARGUMENT

The Court should grant certiorari to review the Fourth Circuit's opinion in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC)*, 149 F.3d 303 (4th Cir. 1998) because (1) the *Laidlaw* opinion creates a split among the circuits; (2) the *Laidlaw* opinion conflicts with this Court's opinion in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49, 66 (1987); (3) the *Laidlaw* opinion conflicts with this Court's opinions in *Tull v. United States*, 481 U.S. 412 (1987), and other cases discussing the deterrent value of civil penalties, and (4) the *Laidlaw* opinion eliminates a remedy authorized by Congress in the Clean Water Act (CWA).

(1) Until the Fourth Circuit's opinion in *Laidlaw*, every circuit to have considered the effect of a defendant's alleged post-complaint compliance on the availability of civil penalties under the CWA has applied mootness principles to determine whether penalties remain available. The first, second, third, fifth, seventh, eighth, and eleventh circuits have all followed

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[1] The parties to this case have consented to the filing of this brief. Pursuant to Supreme Court Rule 37(6), counsel for amici states that no counsel for any party to the Petition for Certiorari authored this brief in whole or in part and no person or party, other than amici, made a monetary contribution to the submission of this brief.

this Court's suggestion in *Gwaltney, supra,* that a *post*-complaint claim of mootness by a defendant based on compliance with the CWA must meet a "heavy burden" to make it "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Gwaltney*, 484 U.S. at 66.

The Fourth Circuit in the instant case, however, declined to apply the mootness analysis of *Gwaltney*, and instead applied the *standing* analysis used by this Court in *Steel Co. v. Citizens for a Better Environment*, 118 S. Ct. 1003 (1998). By applying standing principles (which are intended to evaluate whether a plaintiff may invoke a court's jurisdiction at the time the complaint is filed), rather than mootness principles (which are intended to analyze whether a defendant's *post*-complaint conduct has deprived a court of jurisdiction that is otherwise present), the Fourth Circuit put itself at odds with every other circuit that has considered the issue.

(2) The Fourth Circuit's opinion also conflicts with the *Gwaltney* opinion itself. *Gwaltney* presented the Court with facts remarkably similar to *Laidlaw*. Plaintiff in *Gwaltney* did not seek injunctive relief because the defendant had not violated the CWA since the complaint was filed. Defendant argued that the CWA only allowed citizen suits when a defendant was "in violation" of the Act at the time a complaint was filed. The Court held that so long as a complaint alleged in good faith that a defendant was "in violation," any claims by a defendant that post-complaint events had eliminated a "case or controversy" should be evaluated under traditional principles of mootness. *Gwaltney, supra*, 484 U.S. at 66. The Court did *not* hold that civil penalties (the only remaining remedy for plaintiffs) would not "redress" plaintiffs' injuries.

Although the *Gwaltney* opinion was briefed to the *Laidlaw* panel, the panel did not discuss *Gwaltney*. Instead the panel applied the standing analysis of *Steel Company* and dismissed *Gwaltney* with a "but see" reference. By applying the *pre*-complaint standing analysis of *Steel Company* rather than the *post*-complaint mootness analysis of *Gwaltney*, the *Laidlaw* panel shifted the burden of proof from the defendant to the

plaintiff, and shifted the nature of the inquiry from one examining the defendant's conduct to one examining the plaintiff's qualifications.

Had the *Laidlaw* panel followed *Gwaltney* and applied mootness principles, it would have concluded that this case is not moot. Defendant's alleged post-complaint compliance consisted of easily reversed actions. Defendant had taken these actions (adjusting mercury flow) in the past, only to later resume violating its permit. Furthermore, claims for civil penalties are not moot simply because the acts upon which the claims are based occurred in the past. If that were so, civil penalties could never be imposed in citizen suits, because penalties by their nature can only be imposed for past conduct.

(3) The Court has long recognized that civil penalties deter future misconduct. In *Tull v. United States*, 481 U.S. 412 (1987), the Court stated: "The legislative history of the [CWA] reveals that Congress wanted the district court to consider the need for retribution and deterrence . . . when it imposed civil penalties." 481 U.S. at 422. *See also Hudson v. United States* ___ U.S. ___, 118 S. Ct. 488, 494 (1997) ("all civil penalties have some deterrent effect."). The *Laidlaw* opinion reads the Court's *Steel Company* opinion as eliminating consideration of the deterrent value of penalties when considering whether there is a "case or controversy" within the meaning of Article III. The *Laidlaw* panel stated:

> Prior to *Steel Co.* . . . this court had held that because 'penalties can be an important deterren[t] against future violations,' they could redress a private plaintiff's injury from violations even though the penalties are not paid to the plaintiff . . . Because *Steel Co.* represents 'a superseding contrary opinion of the Supreme Court,' we are required to follow it.

103 F.3d at 306, note 4. This misreading of the *Steel Company* opinion puts the *Laidlaw* panel's opinion squarely at odds with *Tull*, which not surprisingly found that civil penalties *do* deter future misconduct.

(4) The legal effect of the *Laidlaw* panel's opinion is to eliminate a remedy (civil penalties) that Congress authorized in the CWA. The practical effect of the *Laidlaw* panel's opinion

will be to eliminate private enforcement of the CWA altogether.

The citizen suit provision of the CWA, 33 U.S.C. § 1365, provides that in citizen suits to enforce the CWA, courts "shall have jurisdiction . . . to apply any appropriate civil penalties under section 1319(d) of this title." By holding that when plaintiffs seek only civil penalties there is no Article III jurisdiction to hear the claim, the Fourth Circuit has eliminated a remedy authorized by Congress. Such an outcome raises separation of powers issues that warrant review by this Court.

Perhaps more importantly, the *Laidlaw* opinion undermines the entire citizen suit provision of the CWA. The *Laidlaw* court's opinion creates perverse incentives for defendants to delay any determination on the merits of plaintiffs claims in CWA citizen suits, and come into compliance only when an opinion on the merits is unavoidable. Once a defendant comes into compliance, claims for civil penalties will be the only remaining remedy, and the case will be dismissed. Defendant can gain the economic benefit of years of post-complaint noncompliance (in addition to the benefits of pre-complaint noncompliance) without any penalty. Defendants will even escape paying plaintiffs' attorney fees, since the Fourth Circuit refused to consider whether plaintiffs' lawsuit was a causative factor in Laidlaw finally coming into compliance.

These perverse incentives for delay by defendants also create preclusive disincentives for plaintiffs to prosecute in the first instance. No reasonable plaintiff will invest years of time, effort, and expense to prosecute a case, no matter how meritorious, when the defendant can have the case dismissed at will without consequence. Where Congress encouraged citizen enforcement and authorized fee awards for prevailing plaintiffs, the Fourth Circuit has discouraged citizen enforcement and refused even to consider, when evaluating a fee request, whether such enforcement might have caused defendant's compliance.

REASONS FOR GRANTING THE PETITION

I. The Fourth Circuit's Opinion Creates a Conflict Among the Circuits.

Since this Court's *Gwaltney* opinion, seven circuits have addressed defenses based upon allegations of post-complaint compliance in CWA citizen suits. With the exception of the Fourth Circuit's opinion in this case, each of these circuits has held that claims for penalties in citizen suits under the CWA are *not* moot, even though claims for injunctive relief were no longer available because the defendants had come into compliance. Each of these circuits cited *Gwaltney* in reaching their conclusion. *See Comfort Lake Ass'n, Inc. v. Dresel Contracting, Inc.*, 138 F.2d 351, 356 (8th Cir. 1998) ("even if a polluter's *voluntary* permanent cessation of the alleged violations moots a citizen suit claim for injunctive relief, it does not moot a related claim for civil penalties") (emphasis in original) (citing *Gwaltney*); *Atlantic States Legal Foundation, Inc. v. Stroh Die Casting Co.*, 116 F.3d 814, 820 (7th Cir. 1997); *cert. den.*, 118 S. Ct. 442 (1997) ("If the violation is cured at some point while the suit is pending . . . the case nevertheless does not become moot.") (citing *Gwaltney*); *Natural Resources Defense Counsel, Inc. v. Texaco Refining and Man., Inc.*, 2 F.3d 493, 503-504 (3rd Cir. 1993) ("A citizen suit would lose much of its effectiveness if a defendant could avoid paying any penalties by post-complaint compliance.") (discussing *Gwaltney*); *Atlantic States Legal Foundation, Inc. v. Pan American Tanning Corp.*, 993 F.2d 1017, 1020-1021 (2nd Cir. 1993) ("A rule requiring dismissal of a citizen suit in its entirety based on a defendant's post-complaint compliance appears to be in conflict with the language of the Act . . . We hold . . . that a defendant's ability to show, after suit if filed but before judgment is entered, that it has come into compliance with limits on the discharge of pollutants will not render a citizen suit for civil penalties moot.") (citing *Gwaltney*); *Atlantic States Legal Foundation, Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1135-1136 (11th Cir. 1990) ("[I]f the parties are able to make a valid request for injunctive relief at the time the complaint is filed, then they may continue to maintain a suit

for civil penalties, even when injunctive relief is no longer appropriate.") (discussing *Gwaltney*); *Carr v. Alta Verde Industries, Inc.*, 931 F.2d 1055, 1065, n. 9 (5th Cir. 1991) ("Even had the improvements mooted the plaintiffs' action for injunctive relief, it would not necessarily have mooted the plaintiffs' action for civil penalties.") (discussing *Gwaltney*).

The First Circuit, in a pre-*Gwaltney* opinion, reached the same conclusion. *See Pawtuxent Cove Marina, Inc. v. Ciba-Geigy Corp.*, 807 F.2d 1089, 1094 (1st Cir. 1986), *cert. den.*, 484 U.S. 975 (1987); ("A plaintiff who makes allegations warranting injunctive relief in good faith, judged objectively, may recover a penalty judgment for past violations even if the injunction proves unobtainable.").

The Fourth Circuit's *Laidlaw* opinion conflicts with the opinions of these circuits.[2] Where other circuits have recognized that the absence of injunctive relief does not moot a claim for civil penalties, and that eliminating civil penalties undermines a central provision of the CWA, the Fourth Circuit has found that the absence of injunctive relief *does* moot a

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[2] The *Laidlaw* opinion is also creating confusion and disagreement among district court opinions interpreting *Steel Company*. In *San Francisco Baykeeper v. Cargill Salt Division*, No. C-96-02161 (N.D. Cal.) (November 19, 1998), for example, the court held: "The U.S. Supreme Court in [*Steel Company*] established an absolute rule of law that if a plaintiff is not entitled to receive the penalties sought in the action, such as here, where any penalties would go to the U.S. Treasury, the plaintiff does not have standing under Article III of the Constitution to seek such penalties. . . . *See also* [*Laidlaw*]." In *Natural Resources Defense Council v. Southwest Marine, Inc.* ___ F. Supp. ___ 1998 WL 832316 (S.D. Cal) (Nov. 20, 1998), however, the court emphasized that Congress had authorized citizens to seek civil penalties in the citizen suit provision of the CWA, and held: "In the absence of clear case authority by either the Supreme Court or of this Circuit, this Court will not tread so easily on the powers inherent in the judicial branch." *Id.* at 1-2. But in *Dubois v. Department of Agriculture*, 20 F. Supp. 2d 263 (D.N.H. 1998), the court held that *because* it had enjoined the defendant from any further violations, "plaintiffs have failed to establish that the imposition of civil penalties . . . would redress any harm that the plaintiffs either have previously suffered or imminently face." 20 F. Supp. 2d at 268.

claim for civil penalties, without discussing this Court's *Gwaltney* opinion and without discussing whether its ruling will undermine enforcement of the CWA. This Court should grant certiorari to resolve the conflict.

II. The Fourth Circuit's Opinion Is Inconsistent With The Result and the Reasoning In This Court's *Gwaltney* Opinion

The Fourth Circuit's opinion in this case incorrectly applied the standing analysis of *Steel Company*, rather than the mootness analysis of *Gwaltney*, to defendant's allegations of post-complaint compliance. The result is at odds with *Gwaltney*.

A. The *Laidlaw* Opinion Conflicts With the Result of *Gwaltney*

The Fourth Circuit "assume[d] without deciding that Plaintiffs had standing to initiate this action and have proven a continuous injury in fact." *Laidlaw*, Appendix A at 7a. The *Laidlaw* panel nevertheless cited *Steel Company* and concluded that "this action is moot because the only remedy currently available to Plaintiffs – civil penalties payable to the government – would not redress any injury Plaintiffs have suffered." *Laidlaw*, Appendix A at 9a. The Fourth Circuit did not discuss or apply *Gwaltney*, except to acknowledge in a footnote that the panel's decision to deny fees appeared to conflict with *Gwaltney*. Appendix A at 9a, note 5.

In *Gwaltney*, under facts nearly identical to the facts in this case,[3] the Court recognized that traditional mootness principles should be applied to allegations that post-complaint compliance has eliminated Article III jurisdiction. In *Gwaltney*, as in this case, the district court had not issued injunctive relief and the plaintiffs had not sought injunctive relief on appeal. *Gwaltney*, *supra*, 890 F.2d 690, 692 (4th Cir. 1989). Consequently, by the time the case reached this Court, the sole

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[3] Unlike *Gwaltney*, however, there is no dispute in the present case that Laidlaw's violations continued after the complaint was filed.

remaining claim was for civil penalties. Defendant argued that civil penalties alone would not redress plaintiffs' injuries, and therefore the case should be dismissed. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*, No. 86-473, Oct. Term 1987, Reply Br. for Petitioners, at 16. This is the same redressability argument that the Fourth Circuit adopted in the present case. *See Gwaltney, supra*, 484 U.S. at 66.

This Court in *Gwaltney*, however, rejected the argument, and held that if plaintiffs prove standing as of the inception of a case, courts have Article III jurisdiction to hear plaintiffs' claims, unless defendants establish mootness. *Gwaltney*, 484 U.S. at 64-66.[4] The Court's refusal to find that *Gwaltney* was moot simply because injunctive relief was not necessary was consistent with the Court's prior opinions finding that the absence of injunctive relief does not necessarily make a case moot. *See e.g., United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968) (even though defendant on remand might be able to show that injunctive relief was inappropriate, the case was not moot); *United States v. W.T. Grant Co.*, 345 U.S. 629, 635-636 (1953) ("We conclude that, although the actions were not moot, no abuse of discretion has been demonstrated in the trial court's refusal to award injunctive relief."). As the Court held in *Powell v. McCormack*, 395 U.S. 486, 496-97 n. 8 (1969): "Where several forms of relief are requested and one of those requests subsequently becomes moot, the Court has still considered the remaining requests . . . [T]he remaining live issues supply the constitutional requirement of a case or controversy."

The Fourth Circuit did not address *Gwaltney*'s mootness discussion, despite the direct relevance of that discussion.[5]

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[4] The facts that must be alleged, supported, and ultimately proven to support standing are the facts as they existed at the time the plaintiff filed its complaint and sought to trigger the court's jurisdiction. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564, n. 4 (1992).

[5] To compound the problem, the Fourth Circuit refused to consider any application for fees and costs, without any inquiry as to whether plaintiff's suit had caused Laidlaw to come into compliance. The panel then gave a "but see" cite to *Gwaltney*. *Gwaltney*, of course, expressly recognized that "[u]nder the [CWA], plaintiffs are also protected from suddenly repentant defendant by the authority of the district courts to award litigation costs 'whenever the court determines such an award is appropriate.' " 33 U.S.C. § 1365(d). The legislative history of this provision states explicitly that the award of costs 'should extend to plaintiffs in actions which result in successful abatement but which do not reach a verdict.' " 484 U.S. at 49, note 6. The "but see" reference in the *Laidlaw* opinion to this Court's opinion in *Gwaltney* is highly unusual – the Fourth Circuit apparently recognized the conflict between its opinion and *Gwaltney*, but elected not to follow *Gwaltney*. Although the fee provisions of the Act were amended in 1987, those amendments in no way changed the underlying point of *Gwaltney*; if plaintiffs' suit causes defendants to comply, plaintiffs are eligible for fees.

Instead the Fourth Circuit based its decision on *Steel Company*. *Steel Company*, however, did not overrule *Gwaltney*. *Steel Company* involved standing, not mootness. The facts of the instant case are like those in *Gwaltney*, not *Steel Company* – the complaint here alleged continuing violations, and the Fourth Circuit assumed standing and continuing violations at the time the complaint was filed. The issue, therefore, is not whether plaintiffs had standing when they filed the complaint, but whether plaintiffs' request for civil penalties has been rendered moot by defendant's alleged post-complaint compliance.

B. Had The Fourth Circuit Applied *Gwaltney*'s Reasoning, It Would Have Concluded That This Case Is Not Moot

Gwaltney recognized that post-complaint defenses that changes in facts or law have eliminated a "case" or "controversy" within the meaning of Article III are addressed through the lens of mootness. *Gwaltney*, *supra*, 484 U.S. at 66 (once jurisdiction has been established, defendant bears "heavy burden"of showing "that it is *absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur.") (emphasis in original). *See also Gwaltney, supra*, 484 U.S. at 69 (Scalia, J, concurring) ("It does not suffice to defeat subject

matter jurisdiction that the success of the attempted remedies becomes clear months or even weeks after the complaint is filed. Subject matter jurisdiction depends on the state of things at the time of the action brought; if it existed when the suit was brought, 'subsequent events' cannot 'ous[t]' the court of jurisdiction.") (citations omitted). *See generally, Los Angeles County v. Davis*, 440 U.S. 625, 631 (1979) ("[J]urisdiction, properly acquired, may abate if the case becomes moot . . . ") (internal quote marks and citations omitted).

While mootness and standing are related, they are not the same. This Court has described mootness " 'as the doctrine of standing set in a time frame.' " *Arizonans for Official English v. Arizona*, 117 S. Ct. 1055, 1068-69 (1997).[6] While the two doctrines sometimes overlap, they are not identical, and this Court has consistently examined arguments that post-complaint changes have eliminated any "case" or "controversy" by applying mootness, principles, rather than standing principles. *Steel Company* acknowledged this distinction in rejecting the government's argument that a presumption of ongoing harm that applies to mootness claims should also be applied to standing claims. *See Steel Company, supra*, 118 S. Ct. at 1020 ("The 'presumption' the Government refers to has been applied to refute the assertion of *mootness* by a defendant who, when sued in a complaint that alleges present or threatened injury, ceases the complained-of activity . . . It is an immense and unacceptable stretch to call the presumption into service as a substitute for the allegation of present or threatened injury upon which initial *standing* must be based.") (emphasis added); *see also Burke v. Barnes*, 479 U.S. 361, 364 n.* (1987) ("We reject respondents' argument that the questions of mootness and standing are necessarily intertwined").

1. Claims for civil penalties are seldom moot

As the circuits which have followed *Gwaltney* have recognized, claims for civil penalties will seldom be moot, because

[6] *Arizonans*' involved a post-complaint change in the *plaintiff's* status, as opposed to post-complaint changes in the *defendant's* conduct.

the conduct upon which the claims are based occurs in the past, not the future. It is for this reason that the Eleventh Circuit held in *Atlantic States Legal Foundation, Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1134 (11th Cir. 1990) that "the mooting of injunctive relief will not moot the request for civil penalties as long as such penalties were rightfully sought at the time the suit was filed."

In *Reich v. Occupational Safety and Health Comm'n*, 102 F.3d 1200, 1202 (11th Cir. 1997), the court noted that "[c]ourts have traditionally treated monetary relief claims differently than injunctive relief claims for the purpose of mootness challenges." (Citing *Powell v. McCormack*, 395 U.S. 486, 496 n. 8 (1969)). The *Reich* panel identified the practical problem with applying the same mootness test to civil penalties as is applied for injunctive relief: "Accepting the Commission's view of mootness would mean the existence of a 'case or controversy' is dependent on an employer's post-violation acts as well as the date a tribunal sets for a hearing in the proceedings. This innovative view seems to inject unneeded confusion into traditional mootness principles." 102 F.3d at 1202.[7] This is the same practical problem created by *Laidlaw*. If civil penalty claims sought by a plaintiff who otherwise has standing can be rendered "moot" by a defendant's post-complaint conduct, defendants will simply postpone compliance until a decision appears imminent, then come into compliance and move to dismiss as moot. *See* Part IV of this brief, *infra*.

2. The Defendant Carries the Burden of Demonstrating Post-Complaint Compliance Moots a Plaintiff's Suit

A case becomes moot "when the issues presented are no longer 'live' or the parties lack a cognizable interest in the outcome." *United States Parole Commission v. Geraghty*, 445 U.S. 388, 395-96 (1980) (quoting *Powell v. McCormack*, 395 U.S. 486, 496 (1969)). The mootness doctrine, like that of

[7] A claim for civil penalties might become moot upon death or bankruptcy.

standing, derives from the Article III case-or-controversy requirement, but the two are not the same.

> [W]hile the initial burden of establishing the trial court's jurisdiction rests on the party invoking that jurisdiction, once that burden has been met courts are entitled to presume, absent further information, that jurisdiction continues. If a party to an appeal suggests that the controversy has, since the rendering of the judgment below, become moot, that party bears the burden of coming forward with the subsequent events that have produced the alleged results.

Cardinal Chemical Co. v. Morton Int'l, Inc., 508 U.S. 83, 98 (1993). In shifting this burden, this Court has recognized that a defendant who voluntarily halts challenged conduct only *after* being sued generally does not thereby "deprive the tribunal of the power to hear and determine the case." *W.T. Grant*, 345 U.S. at 632; *accord City of Mesquite v. Alladin's Castle, Inc.*, 455 U.S. 238, 289 (1982) ("It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice."); *Concentrated Phosphate*; 393 U.S. at 203 ("Mere voluntary cessation of an allegedly illegal activity does not moot a case; if it did, the courts would be compelled to leave '[t]he defendant . . . free to return to his old ways (citation omitted).' ").

A defendant who seeks to moot a lawsuit by voluntarily halting challenged activity only after being sued must therefore carry the "heavy burden"of showing "that it is *absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur." *Gwaltney*, 484 U.S. at 66 (emphasis in original; internal quote marks omitted). This rule promotes judicial economy and fairness and "protects plaintiffs from defendants who seek to evade sanction by predictable protestations of repentance and reform." *Gwaltney*, 484 U.S. at 67.

This Court in *Steel Company* declined to extend the skepticism of the "voluntary cessation" rule to a pre-complaint claim of standing where the plaintiff admitted there was no likelihood of future violations at the time the complaint was filed. *See* 118 S. Ct. at 1020. In doing so, however, the Court

specifically noted that the presumption of future harm in cases of voluntary *post*-complaint cessation was developed to "refute the assertion of mootness by a defendant who, when sued in a complaint that alleges present or threatened injury, ceases the complained of activity." *Id. See, e.g., W.T. Grant*, 345 U.S. at 629, 632 (1953).

While it may be an "immense and unacceptable stretch to call the presumption into service as a substitute for the allegations of present or threatened injury upon which initial standing must be based," 118 S. Ct. at 1020, it is no stretch at all to apply the presumption in considering a mootness defense. In fact, the presumption was *developed* for this purpose. *See, e.g., W.T. Grant*, 345 U.S. at 632. The presumption of future injury recognized by this Court in *Gwaltney, Steel Company*, and *W.T. Grant* applies to the present case, but was ignored by the *Laidlaw* panel because the panel's opinion failed to acknowledge any distinction between mootness (as discussed in *Gwaltney*), and standing (discussed in *Steel Company*).

3. Mere "Protestations of Repentance and Reform" Do Not Demonstrate That the Controversy Is Moot

Laidlaw has not overcome the presumption of future injury in the case. One factor to consider in deciding whether a defendant has satisfied its burden is whether the defendant would have an incentive to resume its illegal activity. *Cf. Concentrated Phosphates*, 393 U.S. at 202-03 (defendants' mere assertion that the prior illegal practice was no longer economical did not suffice to moot enforcement action); *W.T. Grant Co.*, 345 U.S. at 632 (while a profession of reform is one factor to be considered, it does not suffice to make a case moot). Where a defendant has a financial incentive to resume illegal conduct, cessation of that conduct – even if accompanied by a substantial period of compliance during the lawsuit – is unlikely to make "absolutely clear" that there is "no reasonable expectation that the wrong will be repeated." *See Gwaltney*, 484 U.S. at 66-67; *see also W.T. Grant*, 345 U.S. at 632-33.

Laidlaw did not establish that its illegal behavior could not reasonably be expected to recur. On the contrary, a substantial part of Laidlaw's remedy for its violations involved its decision to reduce the mercury content of the waste it fed into its incinerator. J.A. 124. Laidlaw had reduced the mercury content in the past and subsequently increased it. Since Laidlaw could easily change its practice at any time in the future, had the Fourth Circuit properly applied mootness principles rather than standing requirements, it would have been compelled to find that the case is not moot. *Cf. Gwaltney*, 484 U.S. at 69 (Scalia, J., concurring in part and in the judgment) ("A good or lucky day is not a state of compliance. Nor is the dubious state in which a past effluent problem is not recurring at the moment but the cause of the problem has not been completely and clearly eradicated.").

4. The Denial of an Injunction Is Not Equivalent to a Factual Finding That the Controversy Is Moot

The district court's decision not to enjoin Laidlaw does not mean that Laidlaw met its burden of proving mootness. Abandonment of illegal activity "is an important factor bearing on the question whether a court should exercise its power to enjoin the defendant from renewing the practice, but that is a matter relating to the exercise, rather than the existence, of judicial power." *City of Mesquite*, 455 U.S. at 289. Thus, even in cases in which a court determines that an injunction is inappropriate, claims regarding future violations generally are not mooted by a defendant's "voluntary cessation of illegal activity." *Concentrated Phosphates*, 393 U.S. at 203; *see W.T. Grant*, 345 U.S. at 633-34, 635-36 ("[T]he court's power to grant injunctive relief survives discontinuance of the illegal conduct. . . . The purpose of an injunctive is to prevent future violations."); *Illinois Central R.R. Co. v. Adams*, 180 U.S. 28, 30-32 (1901) (reasoning that the court had jurisdiction, despite the respondent's argument that "the very things the bill was filed to prevent are accomplished facts, and the [petitioner] cannot be injured."

III. The Fourth Circuit's Opinion Is Inconsistent With The Court's Opinion In *Tull v. United States* That Civil Penalties Deter Further Misconduct

The Fourth Circuit concluded that civil penalties would not "redress" plaintiffs' injuries because this Court in *Steel Company* found that "civil penalties imposed would be payable to the United States Treasury and not to the plaintiff and therefore the penalties would not benefit the plaintiff." 118 S. Ct. 1018-19. But this statement was made in an entirely different context. In *Steel Company*, the defendant had fully complied prior to the complaint being filed, and there was no real liklehood of future violations. The principle of "redressability," like the burden of proof, is applied differently in the post-complaint mootness context than it is in the pre-complaint standing context.

The fact that the "redressability" component of the test for standing cannot be satisfied when all violations cease prior to its filing of a complaint (*see Steel Company*, 118 S. Ct. at 1019) does not mean that plaintiffs who *have* standing to initiate a suit cannot obtain civil penalties if injunctive relief becomes inappropriate after the complaint is filed. As *Steel Company* specifically noted: "[I]f respondent had alleged a continuing violation or the imminence of a future violation," then judicial relief designed to deter future violations would "remedy that alleged harm." 118 S. Ct. at 1019.

The Court has consistently recognized that penalties, and the threat of penalties, including CWA penalties, deter future misconduct by persons who are, or may be, penalized. *See Tull v. United States*, 481 U.S. 412, 422-423 (1987) ("[The Court] may also seek to deter future violations by basing the penalty on its economic impact."). *See also Hudson v. United States*, ___ U.S. ___, 118 S. Ct. 488, 494 (1997) ("all civil penalties have some deterrent effect."); *Department of Revenue v. Kurth Ranch*, 511 U.S. 767, 778 (1994) (stating that "civil penalties . . . deter certain behavior."); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 314 (1982) (explaining that an injunction is not the only means of ensuring compliance, for instance, the Clean Water Act itself provides for fines and criminal

penalties). *See generally* D. Epple & M. Visscher, *Environmental Pollution: Modeling Occurrence, Detection, and Deterrence*, 27 Jrnl. L. & Econ. 29, 56 (1984) (empirically linking penalties and deterrence).[8]

The *Steel Company* holding that imposing civil penalties on a defendant who comes into compliance before a complaint was filed will not "redress" past harms does not implicitly overrule the established law and common sense principle that penalties imposed on a defendant who continues to violate the law after a complaint is filed will deter future violations by that defendant. The Fourth Circuit's indiscriminate application of the *Steel Company* deterrence discussion is inconsistent with this Court's decisions in *Tull* and *Weinberger*. When compliance occurs only after a complaint has been filed, as in the instant case, civil penalties deter the very defendant who engaged in past violations. *See Weinberger*, 456 U.S. 305 at 314; *see also Tull*, 481 U.S. at 422-423 (citing 123 Cong. Rec. 39191 (1977)) ("Congress wanted the district court to consider the need for retribution and deterrence, in addition to restitution, when it imposed civil penalties [under the Clean Water Act]."). It was for this reason that Congress empowered district courts to "seek to deter future violations by basing the penalty on its economic impact [to the defendant]." *Tull*, 481 U.S. at 423.

Deterrence in the context of post-complaint compliance differs from deterrence in the context of pre-complaint compliance in at least three ways. First, where there is a continuing post-complaint threat of violation, penalties deter not only the general class of violators, but also the individual violator that is the subject of the lawsuit. Second, the defendant who continues violating even after a complaint is filed is in greater need of deterrence, while a violator who complies after receiving a notice of violation does *not* need to be deterred (in fact,

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[8] In fact, civil penalties may have a *greater* deterrent value than injunctive relief. If violators, especially those that complied only after a lawsuit was filed, "faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality." *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975).

others should be encouraged to act similarly). Third, the deterrence of a specific violator benefits the plaintiffs, who have been adversely affected by past violations and would be adversely affected by future violations. Thus, in the post-complaint context, a plaintiff receives more than merely "psychic satisfaction." *See Steel Company*, 118 S. Ct. at 1019.

Applying an analysis of "deterrence" and "redressability" in the mootness context that differs from the analysis applied in the standing context is consistent with the Court's differential treatment of burdens of proof and presumptions in these contexts. It is also consistent with the Court's more expansive treatment of remedies generally, once it has satisfied itself that a plaintiff has standing.

In *Warth v. Seldin*, 422 U.S. 490, 501 (1975), for example, the Court held that so long as Article III standing requirements were met, "persons to whom Congress has granted a right of action . . . may have standing to seek relief on the basis of the legal rights of others, and, indeed, may invoke the general public interest in support of their claim." Analyzing redressability and civil penalties differently in a post-complaint setting than in a pre-complaint setting is consistent both with *Warth* and with the pre- and post-complaint distinction made by the notice requirement of the CWA's citizen suit provision. Such a distinction also allows the Court to account for the congressional goal of encouraging private individuals to protect public resources. A more expansive post-complaint analysis of redressability is also consistent with our common law heritage of private enforcement of public rights, in which *qui tam* actions, common informer laws, and public nuisance rights were widely recognized, and individual enforcement of community rights "was common because there was no well developed conceptual distinction between public and private functions." Boyer & Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suites Under Federal Environmental Laws*, 34 Buff. L. Rev. 833, 952 (1984). *See also NAACP v. Button*, 371 U.S. 415, 429 (1963) (recognizing the legitimacy of citizen enforcement of non-economic public rights); *Associated Industries v. Ickes*, 134 F.2d 694, 704 (2d Cir. 1943) (Congress may authorize private

citizens to enforce public rights, so long as private litigants' interests are sufficiently affected to create justiciable controversy) (coining the term "private attorneys general"). *See generally* G. Van Cleve, *Congressional Power to Confer Broad Citizen Standing in Environmental Cases*, 29 Envt'l. L. Rep. 10028 (January, 1989).

IV. The Fourth Circuit's Opinion Raises Separation of Powers Concerns Because It Eliminates A Remedy Authorized By Congress And Undermines The Citizen Suit Provision Of The CWA

Congress authorized private citizens to seek civil penalties when enforcing the provisions of the CWA. 33 U.S.C. § 1365. The Fourth Circuit's conclusion that penalties do not "redress" the harm suffered by plaintiffs in otherwise properly initiated citizen suits conflicts with Congress' determination that such penalties *do* address the harm suffered by citizen plaintiffs.[9] Congress' fact (and policy) determinations are entitled to substantial deferrence. *Preseault v. Interstate Commerce Comm.*, 494 U.S. 1, 17 (1990). The courts should not lightly eliminate remedies created by Congress; doing so implicates separation of powers concerns. *See Davis v. Passman*, 442 U.S. 228, 241 (1979) (Congress decides "who may enforce [statutory rights] and in what manner."). This is particularly true in the Article III context. Article III limits the courts' power, not Congress'.[10]

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[9] The perfidy of the Fourth Circuit's opinion is illustrated by the district court's opinion in *Dubois v. Department of Agriculture*, 20 F. Supp. 2d 263 (D.N.H. 1998). In *Dubois* the court enjoined the defendant from further violating the CWA, then found that its own injunction made plaintiffs' request for civil penalties "moot," citing the Fourth Circuit's opinion in the instant case. 20 F. Supp. 2d at 268-70.

[10] It is not unusual for the Court to consider related questions of justiciability differently depending upon whether a statutory provision is involved or not. In evaluating standing, for example, the Court has recognized that "Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules. Of course, Article III's requirement remains . . . ." *Warth v. Seldin*, 422 U.S. 490, 501 (1975).

By finding that plaintiffs may not seek civil penalties, even in properly initiated enforcement actions, the Fourth Circuit has as a practical matter eviscerated the entire citizen suit provision of the CWA. As the Second Circuit noted in *Atlantic States Legal Foundation v. Pan American Tanning Corp.*, 993 F.2d 1017, 1020-21 (2nd Cir 1993):

> A rule requiring dismissal of a citizen suit . . . based on a defendant's post-complaint compliance appears to conflict with the language of the Act. Under such a rule, a penalty suit would *always* become moot and a defendant would escape *all* liability if it could show, at any time before judgment, 'that the allegedly wrongful behavior could not reasonably be expected to recur.' *Gwaltney* I, 484 U.S. at 66, 108 S. Ct. at 386. Yet, as the Fourth Circuit noted in *Gwaltney III*, section 1319(d) of the Act provides that any person who violates effluent limitations or permit conditions '*shall* be subject to a civil penalty.' 890 F.2d at 697. Allowing a discharger to escape all liability by virtue of its post-complaint compliance cannot be squared with this mandatory language.
>
> In addition, we agree with the Eleventh Circuit's view . . . that mooting an entire suit based on post-complaint compliance would weaken the deterrent effect of the Act by diminishing the incentives for citizen plaintiffs to sue and by encouraging defendants to use dilatory tactics in litigation. Pan American suggests, however, that disallowing civil penalties when a defendant comes into compliance after a complaint is filed will not significantly diminish the incentives for citizens to bring suit because they can still recover attorney fees. Pan American further suggests that because any penalties imposed go to the United States Treasury (Treasury) and not to the citizen plaintiff, the pursuit of these monies

> cannot provide an incentive. We disagree. Citizen plaintiffs often initiate suit not to recover monetary awards for their own benefit, but rather to ensure that penalties are imposed so as to deter future violations.

The perverse incentives created by the Fourth Circuit's decision in this case undermine the purpose of the citizen suit provision of the CWA and, as with the civil penalty provision of the CWA, raise separation of powers concerns. *See, e.g., TVA v. Hill*, 437 U.S. 153, 194 (1978) (it is "the exclusive province of the Congress not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation.").

CONCLUSION

The Fourth Circuit has created a conflict among the circuits of the federal court of appeals by wrongly applying this Court's standing analysis in *Steel Company* to a case in which violations continued even after the complaint was filed. The Fourth Circuit should have applied this Court's mootness analysis in *Gwaltney*, as all other circuits have under similar facts. Post-complaint voluntary cessation of illegal activity does not moot a plaintiff's claims for relief, unless the defendant carries the heavy burden of proving that the change makes absolutely clear the wrongful behavior could not be expected to recur. The defendant in this case has not met that burden. The Fourth Circuit's opinion eliminates a remedy authorized by Congress, undermines a key provision of the CWA, and should be reviewed under a writ of certiorari.

Respectfully submitted,

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Supreme Court, U.S.
FILED
MAY 17 1999
CLERK

No. 98-822

IN THE

Supreme Court of The United States

FRIENDS OF THE EARTH, *et al.*,
Petitioners,

vs.

LAIDLAW ENVIRONMENTAL SERVICES (TOC), INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED NOVEMBER 9, 1998
CERTIORARI GRANTED MARCH 1, 1999

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[RELEVANT DOCKET ENTRIES FROM]

U. S. District Court
District of South Carolina (Columbia)

CIVIL DOCKET FOR CASE #: 92-CV-1697

Friends of the Earth, et al v. Laidlaw Environ
Filed: 06/12/92
Assigned to: Judge Joseph F. Anderson, Jr. Jury demand: Plaintiff
Demand: $0,000 Nature of Suit: 893
Lead Docket: None Jurisdiction: Federal Question
Dkt# in other court: None

Cause: 33:1365 Environmental Matters

6/12/92	1	COMPLAINT; FILING FEE $ 120. 00 RECEIPT # 63831 Scheduling order due by 9/14/92 Service due by 7/12/92 for Laidlaw Environ (swil) [Entry date 06/16/92]
7/1/92	4	MOTION by defendant Laidlaw Environ to dismiss (swil) [Entry date 07/07/92]
7/1/92	5	MEMORANDUM by defendant Laidlaw Environ in support of [4-1] motion to dismiss (swil) [Entry date 07/07/92]
7/13/92	--	Motion hearing re: [4-1] motion to dismiss at 10:00 7/23/92 (swil)
7/24/92	8	AMENDED COMPLAINT by plaintiff Friends of the Earth, plaintiff CLEAN, Inc. , (Answer due 8/3/92 for Laidlaw Environ) amending

[1-1] complaint adding plaintiff Sierra Club (swil)

8/4/92 9 MOTION by defendant Laidlaw Environ to dismiss, and to strike [8-1] amended complaint (swil)

8/4/92 10 MEMORANDUM by defendant Laidlaw Environ in support of [9-1] motion to dismiss, [9-2] motion to strike [8-1] amended complaint (swil)

8/7/92 11 MOTION by defendant Laidlaw Environ to dismiss, and to strike [8-1] amended complaint (swil) [Entry date 08/10/92]

10/6/92 20 MOTION by plaintiff Friends of the Earth, plaintiff CLEAN, Inc. , plaintiff Sierra Club for preliminary injunction (swil)

10/6/92 21 BRIEF by plaintiff Friends of the Earth, plaintiff CLEAN, Inc. , plaintiff Sierra Club in support of motion for preliminary injunction. (swil)

10/23/92 26 SUPPLEMENTAL MEMORANDUM by defendant Laidlaw Environ in support of [11-1] motion to dismiss, [11-2] motion to strike [8-1] amended complaint (jhal) [Entry date 11/02/92]

10/26/92 27 Brief by plaintiff Friends of the Earth, plaintiff CLEAN, Inc. , plaintiff Sierra Club in opposition to [11-1] motion to dismiss, [11-2] motion to strike [8-1] amended complaint (jhal)

[Entry date 11/02/92]

10/30/92 28 REPLY by defendant Laidlaw Environ to [27-1] opposition memorandum (jhal) [Entry date 11/09/92]

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11/16/92 32 REPLY BRIEF by plaintiff Friends of the Earth, plaintiff CLEAN, Inc. , plaintiff Sierra Club in support of [20-1] motion for preliminary injunction (jhal) [Entry date 11/17/92]

11/19/92 -- Motion hearing re: [20-1] motion for preliminary injunction, [11-1] motion to dismiss, [11-2] motion to strike [8-1] amended complaint. (JFA,jr/gs). Motion for Prel. Inj, cont'd until 11/20/92. Deft's motion to dismiss, denied. Deft's motion to strike, denied. (jhal)

11/20/92 -- Motion hearing re: [20-1] motion for preliminary injunction. (JFA,jr/gs). Court hears argument and takes under advisement. Written Order to be entered. (bwil)

12/3/92 35 SUPPLEMENTAL MEMORANDUM by plaintiff Friends of the Earth, plaintiff CLEAN, Inc. , plaintiff Sierra Club in support of [20-1]

motion for preliminary injunction (jhal)[Entry date 12/16/92]

12/14/92 37 ORDER denying [20-1] motion for preliminary injunction, denying [11-1] motion to dismiss, denying [11-2] motion to strike [8-1] amended complaint, denying [9-1] motion to dismiss, denying [9-2] motion to strike [8-1] amended complaint and granting plaintiffs' motion made orally at the hearing on 11/19 to add Sierra Club as a co-plaintiff (signed by Judge Joseph F. Anderson Jr.) (jhal) [Entry date 12/16/92]

2/26/93 43 MOTION by defendant Laidlaw Environ for summary judgment as to plaintiff Friends of the Earth (jhal) [Entry date 03/01/93]

2/26/93 44 MEMORANDUM by defendant Laidlaw Environ in support of [43-1] motion for summary judgment as to plaintiff Friends of the Earth (jhal) [Entry date 03/01/93]

3/11/93 47 AMENDED MEMORANDUM by defendant Laidlaw Environ in support of [43-1] motion for summary judgment as to plaintiff Friends of the Earth substituting memorandum in support filed 2/26/93 (jhal) [Entry date 03/24/93]

4/2/93 52 RESPONSE in opposition by plaintiff Friends of the Earth to defendant's [43-1] motion for summary judgment as to plaintiff Friends of the Earth (jhal) [Entry date 04/10/93]

4/12/93 54 AMENDED COMPLAINT by plaintiff Friends of the Earth, plaintiff CLEAN, Inc. , plaintiff Sierra Club , (Answer due 4/22/93 for Laidlaw Environ) Service due by 5/12/93 for Laidlaw Environ amending [8-1] amended complaint; (jhal) [Entry date 04/13/93]

4/12/93 55 REPLY MEMORANDUM by plaintiff Friends of the Earth, plaintiff CLEAN, Inc. , plaintiff Sierra Club in support of [50-1] cross motion to compel defendant to designate witnesses pursuant to plaintiff's deposition notice, for sanctions (jhal) [Entry date 04/13/93]

4/12/93 54 MOTION/Request by plaintiff Friends of the Earth, plaintiff CLEAN, Inc. , plaintiff Sierra Club for injunctive relief incorporated into amended complaint filed 4/12/93, doc #54 (jhal) [Entry date 04/13/93]

4/16/93 57 REPLY by defendant Laidlaw Environ to response to [43-1] motion for summary judgment as to plaintiff Friends of the Earth (jhal) [Entry date 04/26/93]

4/23/93 58 MOTION by defendant Laidlaw Environ to dismiss or in the alternative, to strike plaintiffs' newest amended complaint (jhal) [Entry date 04/30/93]

4/23/93 59 MEMORANDUM by defendant Laidlaw Environ in support of [58-1] motion to dismiss or in the alternative, to strike plaintiffs' newest amended complaint (jhal) [Entry date 04/30/93]

5/14/93 61 RESPONSE by plaintiff Friends of the Earth, plaintiff Sierra Club in opposition to [58-1] motion to dismiss or in the alternative, to strike plaintiffs' newest amended complaint. (ghay) [Entry date 05/24/93]

6/29/93 71 SUPPLEMENTAL MEMORANDUM by plaintiffs Friends of the Earth, CLEAN, Inc. , Sierra Club in opposition to [43-1] motion for summary judgment as to plaintiff Friends of the Earth. Exhibits to Supplemental Memorandum attached as Volumes I and II. (ghay)

6/30/93 -- Motion hearing re: [43-1] motion for summary judgment as to plaintiff Friends of the Earth Motion hearing held (JFA,JR/Jack Clarke). Motion for Summary Judgment denied. (bwil)

6/30/93 -- Minute entry: denying [43-1] motion for summary judgment as to plaintiff Friends of the Earth (bwil)

7/9/93 77 SUPPLEMENTAL MEMORANDUM by defendant Laidlaw Environmental in support of [58-1] motion to dismiss or in the alternative, to strike plaintiffs' newest amended complaint. (ghay) [Entry date 07/13/93]

10/26/93 -- Bench trial held before Judge Joseph F. Anderson Jr. / Gary Smith: as to the issue of the factual dispute on delingent prosecution: Court grants defendant's Oral Motion for Protective Order and plaintiff to provide the appropriate witness fee for subpoenaes issued to

defendant. Opening statements: Witnesses/Exhibits. (ydav) [Entry date 10/27/93]

10/27/93 -- Bench trial continues before Judge Joseph F. Anderson Jr. /gary smith. Witnesses/Exhibits. Plaintiff's oral motion for judgment as a matter of law as to issue of factual dispute on diligent prosecution - Denied. (nhar)

10/28/93 -- Bench trial continued before Judge Joseph F. Anderson Jr. /Gary Smith: Witnesses/Exhibits. Defendant's Oral Motion for judgment as a matter of law--Denied. (ydav) [Entry date 10/29/93]

10/29/93 -- Bench trial continued before Judge Joseph F. Anderson Jr. /Gary Smith: Witnesses. Trial continued to November 29, 1993. (ydav) [Entry date 11/01/93]

11/9/93 86 Transcript of Gary Smith of non-jury trial before Honorable Joseph F. Andrson, Jr. , in Columbia on 10/26/93 (Volume I). (bwil)

11/23/93 87 Transcript (Volume III) filed by Gary N. Smith of proceedings on 10/28/93 in Columbia - Non-Jury Trial. (bwil)

11/23/93 88 Transcript (Volume IV) filed by Gary Smith of proceedings on 10/29/93 in Columbia - Non-Jury Trial. (bwil)

11/29/93 91 MOTION by plaintiff Friends of the Earth, plaintiff CLEAN, Inc. , plaintiff Sierra Club to amend [54-1] amended complaint (nhar)

11/29/93 92 MEMORANDUM by plaintiff Friends of the Earth, plaintiff CLEAN, Inc. , plaintiff Sierra Club in support of [91-1] motion to amend [54-1] amended complaint with proposed Third Amended Complaint attached as Exhibit 1. (nhar)

11/29/93 -- Bench trial held before Judge Joseph F. Anderson Jr. /gary smith and jack clarke - continues. Defendant's witnesses (nhar)

11/30/93 93 Transcript (Volume V) of proceedings held 11/29/93 in Columbia before Judge Anderson (Non-Jury trial). (ghay)

11/30/93 -- Bench trial continued before Judge Joseph F. Anderson Jr. /Gary Smith and Jack Clarke. WITNESSES/EXHIBITS. Certain portions of testimony sealed. (bwil) [Entry date 12/02/93]

12/1/93 -- Bench trial completed before Judge Joseph F. Anderson Jr. /Gary Smith and Jack Clarke. WITNESSES/EXHIBITS. Certain portions of testimony sealed. Clerk requests counsel for plaintiff to file depositions which were used for impeachment purposes at trial. Counsel will file after trial with updated exhibit list for the record. Court takes under advisement and directs counsel to submit proposed Findings of Fact and Conclusions of Law (to be

mailed on or before January 3. 1994 - 75-page limit. Court will hear oral arguments after submissions. (bwil) [Entry date 12/02/93]

12/1/93 94 Transcript (Volume II) of proceedings held 10/27/93 in Columbia before Honorable Joseph F. Anderson, Jr. - Non-Jury Trial. (bwil) [Entry date 12/02/93]

12/1/93 95 Transcript (Volume VI) of proceedings on 11/30/93 in Columbia before Honorable Joseph F. Anderson, Jr. - Non-Jury trial. (Excluding Sealed Portions). (bwil) [Entry date 12/02/93]

12/1/93 96 Transcript (SEALED) - VOLUME VI - proceedings on 11/30/93 in Columbia before Honorable Joseph F. Anderson, Jr. - Non-Jury trial. (bwil) [Entry date 12/02/93]

12/1/93 97 Transcript (SEALED) - Volume VII - proceedings held 12/1/93 in Columbia before Honorable Joseph F. Anderson, Jr. - Non-Jury trial. (bwil) [Entry date 12/02/93]

12/15/93 100 RESPONSE by defendant Laidlaw Environmental in opposition to [91-1] motion to amend [54-1] amended complaint. (ghay) [Entry date 12/16/93]

1/19/94 102 REPLY by plaintiffs Friends of the Earth, CLEAN, Inc. to defendant's [100-1] opposition response to plaintiffs' motion to file 3rd amended complaint. (ghay)

1/24/94	--	Bench trial held before Judge Joseph F. Anderson Jr. /Gary Smith. Oral arguments on the mertis. Court takes under advisement and will issue written order. Plaintiff's motion to amend complaint, under advisement. (bwil)
1/24/94	--	Minute entry: [91-1] motion to amend [54-1] amended complaint taken under advisement (bwil)
2/10/94	--	Motion hearing re: [103-1] motion to hold open the record until 3/4/94. Court grants motion to hold open record until 3/4/94 and further directs parties to submit proposed questions which shall be submitted to EPA in the event court decides to ask EPA to submit amicus brief. Proposed questions to be submitted within ten days. (bwil)
2/10/94	--	Minute entry: granting [103-1] motion to hold open the record until 3/4/94. (bwil)
2/10/94	105	SUPPLEMENTAL MEMORANDUM by defendant Laidlaw Environ in support of [58-1] motion to dismiss or in the alternative, to strike plaintiffs' newest amended complaint. (ghay) [Entry date 02/11/94] [Edit date 02/11/94]
3/28/94	106	ORDER mooting [62-1] motion for leave to file Supplemental Memorandum in Support of its Motion for Summary Judgment as to Plaintiff Friends of the Earth; mooting [58-1] motion to dismiss or in the alternative, to strike plaintiffs' newest amended complaint; mooting [54-1]

		motion for injunctive relief. (signed by Judge Joseph F. Anderson Jr.) eod mld 3/28/94. (ghay)
3/29/94	107	ORDER requesting EPA file amicus curiae brief in this action. Copy of letter to Department of Justice requesting brief attached to this order. (signed by Judge Joseph F. Anderson Jr.) eod mld 3/29/94. (ghay)
4/22/94	108	MEMORANDUM by plaintiff Friends of the Earth, plaintiff CLEAN, Inc. , plaintiff Sierra Club in opposition to defendant's motion to dismiss. (bwil) [Entry date 04/25/94]
5/31/94	109	BRIEF by United States of America as Amicus Curiae. (ghay)
6/6/94	110	ORDER: Defendant's reply brief due for 6/27/94 to Government's amicus curiae brief. Plaintiff's shall file their reply memorandum within 30 days of defendant's response. (signed by Judge Joseph F. Anderson Jr.) eod mld 6/7/94. (ghay) [Entry date 06/07/94]
7/7/94	111	SECOND SUPPLEMENTAL MEMORANDUM by plaintiffs Friends of the Earth in opposition to defendant's [58-1] motion to dismiss. (ghay) [Entry date 07/09/94]
7/8/94	112	REPLY by defendant Laidlaw Environmental to [109-1] brief amicus curiae of U.S.A. (ghay) [Entry date 07/18/94]

7/22/94 114 REPLY by U.S. as amicus curiae to defendant Laidlaw's response [112-1] to the U. S. 's brief. (ghay) [Entry date 07/25/94]

7/25/94 115 REPLY by defendant Laidlaw Environ to plaintiffs' [111-1] second supplemental opposition memorandum to defendant's motion to dismiss. (ghay) [Entry date 07/27/94]

8/8/94 116 ORDER Plaintiff's Reply to Response to Motion to dismiss to be filed by 8/15/94. (signed by Judge Joseph F. Anderson Jr.) eod mld 8/9/94. (ghay) [Entry date 08/09/94]

8/15/94 117 REPLY by plaintiff Friends of the Earth, plaintiff CLEAN, Inc. in response to defendant's submission regarding defendant's mercury limitation re: [111-1] opposition memorandum. (ghay)

8/18/94 118 REPLY MEMORANDUM by plaintiff Friends of the Earth, plaintiff CLEAN, Inc. to submissions of EPA and Defendant regarding economic benefit. (ghay) [Entry date 08/19/94]

8/24/94 119 SUPPLEMENTAL REPLY by defendant Laidlaw Environmental to [109-1] brief of U. S. as amicus curaie. (ghay) [Entry date 08/25/94]

9/19/94 120 REPLY by plaintiff Friends of the Earth, plaintiff CLEAN, Inc. , plaintiff Sierra Club to defendant's [119-1] reply to DOJ amicus brief

and response to plaintiff's reply brief. (ghay)

9/30/94 121 RESPONSE by defendant Laidlaw Environ in opposition to plaintiffs' brief regarding the ICI Americas decision. (ghay) [Entry date 10/04/94]

10/21/94 122 THIRD SUPPLEMENTAL MEMORANDUM by plaintiffs Friends of the Earth, CLEAN, Inc., and Sierra Club in opposition to defendant's [58-1] motion to dismiss or in the alternative, to strike plaintiffs' newest amended complaint. (ghay)

11/3/94 123 SUPPLEMENTAL MEMORANDUM by defendant Laidlaw Environ in support of its [59-1] support memorandum, re: its [58-1] motion to dismiss or in the alternative, to strike plaintiffs' newest amended complaint. (ghay) [Entry date 11/07/94]

11/4/94 124 REPLY by defendant Laidlaw Environ to plaintiff's third supplemental [122-1] opposition memorandum re: defendant's motion to dismiss. (ghay) [Entry date 11/07/94]

11/14/94 126 REPLY MEMORANDUM by plaintiff Friends of the Earth, plaintiff CLEAN, Inc. to defendants' supplemental [123-1] support memorandum re: defendants' motion to dismiss. (ghay) [Entry date 11/17/94]

12/5/94 128 MEMORANDUM by plaintiff Friends of the Earth, plaintiff CLEAN, Inc. regarding res

judicata and collusion. (ghay)

12/5/94 129 RESPONSE by defendant Laidlaw Environ in opposition to [125-1] Court's Letter dated 11/9/94. (ghay) [Entry date 12/06/94]

12/12/94 130 MEMORANDUM by amicus SCDHEC responding to issues raised in the court's letter of 11/9/94. (ghay) [Entry date 12/15/94]

3/21/95 131 NOTICE of Subsequent Precedent by plaintiff CLEAN, Inc. , plaintiff Friends of the Earth. Re: Public Interest Research Group of NJ v. Magnesium Elektron, Inc. (ghay)

3/23/95 132 REPLY by defendant Laidlaw Environ to plaintiffs'[131-1] notice of subsequent precedent. (ghay) [Entry date 03/28/95]

4/7/95 133 FINDINGS OF FACT AND CONCLUSIONS OF LAW. Plaintiffs' citizen suit allowed to proceed beyond the threshold limitation of section 505(b)(1)(B). This order does not address the merits of the plaintiffs' action. A separate scheduling order will be entered for substantive motions and a trial date for the remaining issues in the case. (signed by Judge Joseph F. Anderson Jr.) eod mld 4/7/95. (ghay)

4/14/95 135 ORDER granting plaintiffs' [91-1] motion to amend [54-1]. amended complaint, mooting defendant's [58-1] motion to dismiss or in the alternative, to strike plaintiffs' second amended

complaint. (signed by Judge Joseph F. Anderson Jr. eod mld 4/17/95. (ghay) [Entry date 04/17/95]

5/23/95 139 MOTION by plaintiff Sierra Club, plaintiff CLEAN, Inc. , plaintiff Friends of the Earth for partial summary judgment in favor of plaintiffs. (ghay) [Entry date 05/24/95]

5/23/95 140 MEMORANDUM by plaintiff Sierra Club, plaintiff CLEAN, Inc. , plaintiff Friends of the Earth in support of [139-1] motion for partial summary judgment in favor of plaintiffs. (ghay) [Entry date 05/24/95]

5/30/95 141 MOTION by SC State Chamber of Commerce and SC Textile Manufacturers Assn. for Julianne Farnsworth, Esq. to file amicus brief. Proposed amicus brief attached to motion. (ghay) [Entry date 05/31/95]

5/30/95 143 MOTION by defendant Laidlaw Environ for partial summary judgment in favor of defendant Laidlaw. (jhal) [Entry date 06/01/95]

5/30/95 144 MEMORANDUM by defendant Laidlaw Environ in support of [143-1] motion for partial summary judgment in favor of defendant Laidlaw. (jhal) [Entry date 06/01/95]

5/30/95 145 MOTION by defendant Laidlaw Environ for reconsideration of [133-1] findings of fact order of 4/7/95 or alternatively for certification to the Fourth Circuit. (jhal) [Entry date 06/01/95]

5/30/95 146 MEMORANDUM by defendant Laidlaw Environ in support of [145-1] motion for reconsideration of [133-1] findings of fact order of 4/7/95 or alternatively for certification to the Fourth Circuit. (jhal) [Entry date 06/01/95]

6/5/95 147 MOTION by plaintiff Sierra Club, plaintiff CLEAN, Inc. , plaintiff Friends of the Earth for expedited discovery and postponement of oral argument on the cross motions for partial summary judgment (ghay) [Entry date 06/06/95]

6/5/95 148 MEMORANDUM by plaintiff Sierra Club, plaintiff CLEAN, Inc. , plaintiff Friends of the Earth in support of [147-1] motion for expedited discovery and postponement of oral argument the cross motions for partial summary judgment (ghay) [Entry date 06/06/95]

6/5/95 155 BRIEF by amicus SC Chamber Commerce, amicus SC Textile Mfrs. (ghay) [Entry date 06/19/95]

6/7/95 151 RESPONSE by defendant Laidlaw Environ in opposition to [139-1] motion for partial summary judgment in favor of plaintiffs. (bwil) [Entry date 06/09/95]

6/9/95 154 MEMORANDUM by defendant Laidlaw Environ in opposition to [147-1] motion for expedited discovery and postponement of oral argument on the cross motions for partial summary judgment (ghay) [Entry date

06/13/95]

6/12/95 153 BRIEF by amicus SC Industrial Waste. (ghay) [Entry date 06/13/95]

6/19/95 157 MEMORANDUM by plaintiff Sierra Club, plaintiff CLEAN, Inc. , plaintiff Friends of the Earth in opposition to [145-1] motion for reconsideration of [133-1] findings of fact order of 4/7/95 or alternatively for certification to the Fourth Circuit. (ghay)

6/19/95 156 MEMORANDUM by plaintiff Sierra Club, plaintiff CLEAN, Inc. , plaintiff Friends of the Earth in opposition to [143-1] motion for partial summary judgment in favor of defendant Laidlaw. (ghay)

6/26/95 158 MOTION by plaintiff Sierra Club, plaintiff CLEAN, Inc. , plaintiff Friends of the Earth for leave to file Reply to Defendant's Response in Opposition to Plaintiff's motion for partial summary judgment. (ghay)

6/26/95 161 AMENDED BRIEF by amicus SC Chamber Commerce, amicus SC Textile Mfrs. (ghay)

6/27/95 -- Motion hearing re: [158-1] motion for leave to file Reply to Defendant's Response in Opposition to Plaintiff's motion for partial summary judgment. , [147-1] motion for expedited discovery and postponement of oral argument on the cross motions for partial summary judgment, [145-1] motion for

reconsideration of [133-1] findings of fact order of 4/7/95 or alternatively for certification to the Fourth Circuit. , [143-1] motion for partial summary judgment in favor of defendant Laidlaw. , [139-1] motion for partial summary judgment in favor of plaintiffs. , [137-1] motion to serve supplemental discovery. Both motions for discovery, moot. Motion for reconsideration, denied. Plaintiff's motion for S/J, denied. Defendants' motion for partial S/J, granted, in part. Plaintiff's motion for leave to file, granted. (JFA,jr/Jane LaPorte). (bwil)

6/27/95 -- Minute entry: granting [158-1] motion for leave to file Reply to Defendant's Response in Opposition to Plaintiff's motion for partial summary judgment. , mooting [147-1] motion for expedited discovery and postponement of oral argument on the cross motions for partial summary judgment, denying [145-1] motion for reconsideration of [133-1] findings of fact order of 4/7/95 or alternatively for certification to the Fourth Circuit. , granting [143-1] motion for partial summary judgment in favor of defendant Laidlaw. , denying [139-1] motion for partial summary judgment in favor of plaintiffs. , mooting [137-1] motion to serve supplemental discovery. (bwil)

6/27/95 192 REPLY by plaintiff Friends of the Earth, plaintiff CLEAN, Inc. , plaintiff Sierra Club to defendant's response to plaintiff's [139-1] motion for partial summary judgment in favor

of plaintiffs. [Filed pursuant to ruling granting plaintiffs leave to reply.]. (ghay) [Entry date 06/05/96]

6/29/95 162 Minute order: directing that two motions for discovery are moot; motion for leave to file is granted, deft's motion for summary judgment is granted, in part and denied, in part, and plaintiff's motion for summary judgment is denied. mld eod 6/29/95. (bwil)

7/10/95 163 ORDER denying defendant's [145-1] motion for reconsideration of [133-1] findings of fact order of 4/7/95 and denying alternatively for certification to the Fourth Circuit. (signed by Judge Joseph F. Anderson Jr.) eod mld 7/10/95. (ghay)

7/31/95 -- Bench trial (Phase II) held before Judge Joseph F. Anderson Jr. /Jane LaPorte. Opening statements. WITNESSES/EXHIBITS. (bwil) [Entry date 08/01/95]

8/1/95 -- Bench trial (Phase II) held before Judge Joseph F. Anderson Jr. /Jane LaPorte. WITNESSES/EXHIBITS. (bwil) [Entry date 08/02/95]

8/2/95 -- Bench trial (Phase II) held before Judge Joseph F. Anderson Jr. /Jane LaPorte. WITNESSES/EXHIBITS. Court takes under advisement and will issue written order. Counsel to submit proposed Findings of Fact and Conclusions of Law (limited to 35 pages)

within 45 days. (bwil)

10/13/95 173 MOTION by defendant Laidlaw Environ to reopen the record for receiving newling discovered evidence. (ghay) [Entry date 10/17/95]

10/13/95 174 MEMORANDUM by defendant Laidlaw Environ in support of its [173-1] motion to reopen the record for receiving newling discovered evidence. (ghay) [Entry date 10/17/95]

10/13/95 175 BRIEF by defendant Laidlaw Environ re: noncompliance date of the Lancy Metals Removal System. (ghay) [Entry date 10/17/95]

10/13/95 176 BRIEF by defendant Laidlaw Environ re: Proposed Findings of Fact and Conclusions of Law. (ghay) [Entry date 10/17/95]

10/16/95 171 BRIEF/PROPOSED POST TRIAL FINDINGS OF FACT AND CONCLUSIONS OF LAW by plaintiff Friends of the Earth. Part of this document is filed under SEAL pursuant to the court's 11/24/93 protective order. (ghay)

10/17/95 177 POST TRIAL BRIEF by plaintiff Friends of the Earth (ghay) [Entry date 10/18/95]

12/19/95 191 NOTICE of Subsequent Precedent by defendant Laidlaw. Re: Employers Ins Co. of Wausau. (ghay) [Entry date 06/05/96]

1/29/96 180 RESPONSE by plaintiff Friends of the Earth, plaintiff CLEAN, Inc. , plaintiff Sierra Club to [173-1] motion to reopen the record for receiving newling discovered evidence. (ghay) [Entry date 01/30/96]

1/29/96 181 CROSS MOTION by plaintiff Friends of the Earth, plaintiff CLEAN, Inc. , plaintiff Sierra Club to reopen record so that the two M⌂DMR reports be received into evidence. (ghay) [Entry date 01/30/96]

1/29/96 182 MEMORANDUM by plaintiff Friends of the Earth, plaintiff CLEAN, Inc. , plaintiff Sierra Club in support of [181-1] motion to reopen record so that the two M⌂DMR reports be received into evidence. (ghay) [Entry date 01/30/96]

2/1/96 -- SET CLOSING ARGUMENT AND Motion hearing re: [181-1] motion to reopen record so that the two M⌂DMR reports be received into evidence and [173-1] motion to reopen the record for receiving newly discovered evidence at 2:00 2/29/96 (ghay)

2/13/96 183 RESPONSE by defendant Laidlaw Environ to [181-1] motion to reopen record so that the two M⌂DMR reports be received evidence. (ghay) [Entry date 02/16/96]

2/20/96 184 REPLY/RESPONSE by plaintiff CLEAN, Inc., plaintiff Friends of the Earth to defendant's notice of subsequent precedent and defendant's

letters of 1/20 and 2/9/96. (ghay) [Entry date 02/26/96]

2/23/96 185 REPLY by plaintiff CLEAN, Inc., plaintiff Friends of the Earth to response to [181-1] motion to reopen record so that the two M⌂DMR reports be received into evidence. (ghay) [Entry date 02/26/96]

2/29/96 -- Motion hearing re: [181-1] motion to reopen record so that the two M⌂DMR reports be received into evidence. Motion hearing held, [173-1] motion to reopen the record for receiving newling discovered evidence. Motion hearing held. Court takes under advisement and will issue written order. Court hears closing arguments and directs counsel to submit amended Findings within 21 days. (bwil)

2/29/96 -- Minute entry: [181-1] motion to reopen record so that the two M⌂DMR reports be received into evidence. taken under advisement, [173-1] motion to reopen the record for receiving newling discovered evidence. taken under advisement (bwil)

3/15/96 -- Mediation/Settlement conference set on 10:00 3/19/96 before Magistrate Judge Bristow Marchant. (ghay)

4/16/96 187 MOTION by defendant Laidlaw Environ to dismiss plaintiff's complaint as moot. (ghay) [Entry date 04/19/96]

4/16/96 188 MEMORANDUM by defendant Laidlaw Environ in support of its [187-1] motion to dismiss plaintiff's complaint as moot. (ghay) [Entry date 04/19/96]

4/30/96 189 RESPONSE by plaintiffs to defendant's [187-1] motion to dismiss plaintiff's complaint as moot. (ghay)

5/7/96 190 REPLY by defendant Laidlaw Environ to plaintiff's response to defendant's [187-1] motion to dismiss plaintiff's complaint as moot. (ghay) [Entry date 05/09/96]

9/18/96 193 ORDER denying defendant's [187-1] motion to dismiss plaintiff's complaint as moot. (signed by Judge Joseph F. Anderson Jr.) eod mld 9/18/96. (ghay)

9/23/96 194 ORDER granting defendant Laidlaw's [173-1] motion to reopen the record for receiving newling discovered evidence. (signed by Judge Joseph F. Anderson Jr.) eod mld 9/23/96. (ghay)

9/23/96 195 ORDER granting plaintiff's [181-1] motion to reopen record so that the two M⌂DMR reports be received into evidence. (signed by Judge Joseph F. Anderson Jr.) eod mld 9/23/96. (ghay)

10/3/96 -- Tele-conference held with Magistrate Judge Bristow Marchant's Law Clerk and Bruce Terris and Don Cockrill: Both parties informed Clerk

that the case was not ready for a hearing due to ongoing discovery; Clerk requested that both parties notify the Judge in writing of the status of the case. (entered AT DIRECTION OF COURT) (will) [Entry date 10/04/96]

12/19/96 196 STIPULATION AND ORDER regarding U. S. Filter and the Lancy treatment system. The full transcript of the Rule30(b)(6) deposition of US Filter is admitted [and docketed separately] as part of the record in this case. By 12/20/96 each party shall submit a brief to the court addressing the impact of the guaratee to the issues in the case and provide any revisions to the party's proposed findings of fact and conclusions of law. (signed by Judge Joseph F. Anderson Jr.) eod mld 12/20/96 cc: all counsel (without attached deposition). (ghay) [Entry date 12/20/96]

12/19/96 197 DEPOSITION of Stanley R. Karrs. P. E. (filed pursuant to 196-1 order of Judge Joseph F. Anderson, Jr.). (ghay) [Entry date 12/20/96]

1/22/97 198 FINDINGS OF FACT AND CONCLUSIONS OF LAW: the court holds that it has jurisdiction over defendant's violations of its NPDES permit and the Clean Water Act; defendant is liable for the violation of the mercury discharge limitation and the violation of the monitoring and reporting requirements of its NPDES permit; and a civil penalty of $405,800.00 is assessed against defendant

Laidlaw. The plaintiff's request for a permanent injunction is denied. (signed by Judge Joseph F. Anderson Jr.) eod mld 1/22/97. (ghay)

1/22/97 199 JUDGMENT that defendant Laidlaw is assessed a civil penalty in the amount of $405,800.00 for violations of mercury discharge limitation and violations of monitoring and reporting requirements of its NPDES permit and the Clean Water Act. Interest (post-judgment): 5. 61% (signed by clerk; approved by Judge Joseph F. Anderson Jr.) eod mld 1/22/97. (ghay)

1/22/97 -- Case closed (ghay)

2/19/97 207 NOTICE OF APPEAL by plaintiff Sierra Club, plaintiff Citizens Local Env, plaintiff Friends of the Earth Re: [199-1] judgment order, [198-1] findings of fact order Fee Status: PAID, 300/11968 (cham)

2/19/97 208 NOTICE OF APPEAL by defendant Laidlaw Environ Re: [199-1] judgment order Fee Status: PAID, 600/3630 (cham) [Entry date 02/22/97]

2/20/97 -- Notice of appeal and certified copy of docket to USCA: [207-1] appeal by Friends of the Earth, Citizens Local Sierra Club (cham)

2/22/97 -- Notice of appeal and certified copy of docket to USCA: [208-1] appeal by Laidlaw Environ (cham)

2/27/97 -- NOTICE of Docketing ROA from USCA Re: [207-1] appeal by Friends of the Earth, Citizens Local Env, Sierra Club NUMBER: 97-1246, Donna Brown (cham) [Entry date 02/28/97]

3/3/97 -- NOTICE of Docketing ROA from USCA Re: [208-1] appeal by Laidlaw Environ USCA NUMBER: 97-1261, 97-1246(L), Donna Brown (cham)

5/12/97 214 TRANSCRIPT filed [207-1] appeal by Friends of the Earth, Citizens Local Env, Sierra Club, [208-1] appeal by Laidlaw Environ for dates of 6/30/93 hearing (cham)

7/23/97 219 Certificate that the Record on Appeal is Complete for [207-1] appeal by Friends of the Earth, Citizens Local Sierra Club, [208-1] appeal by Laidlaw Environ (cham)

7/20/98 223 Opinion of the 4th Circuit vacated and remanded with instructions to dismiss the action; re: [207-1] appeal by Friends of the Earth, Citizens Local Env, Sierra Club, [208-1] appeal by Laidlaw Environ (cham)

8/10/98 224 JUDGMENT OF USCA (certified copy) vacates the judgment of the District Court, and remands the case for further proceedings consistent with this opinion; Re: [207-1] appeal by Friends of the Earth, Citizens Local Env, Sierra Club, [208-1] appeal by Laidlaw Environ (cham)

8/17/98 -- Record on Appeal returned from U. S. Court of Appeals: [207-1] appeal, [208-1] appeal (cham)

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

FRIENDS OF THE EARTH, INC.,
218 D Street, S.E.
Washington, D.C. 20003
(202) 544-2600

and

CITIZENS LOCAL ENVIRONMENTAL ACTION NETWORK, INC.,
P.O. Box 50529
Columbia, South Carolina 29250

and

SIERRA CLUB
730 Polk Street
San Francisco, California 94109

Plaintiffs,

v.

LAIDLAW ENVIRONMENTAL SERVICES (TOC), INC.,
100 Executive Center Drive
Santee Building, Suite 128
Columbia, South Carolina 29210

Defendant.

Civil No. 3:92-1697-17

THIRD AMENDED COMPLAINT AND REQUEST FOR INJUNCTIVE RELIEF

INTRODUCTION

1. This is a citizen's suit, brought under Section 505 of the Federal Water Pollution Control Act (hereafter "the Act"), as amended, 33 U.S.C. 1365, to remedy defendant's repeated violations of the terms and conditions of its National Pollutant Discharge Elimination System (hereafter "NPDES") permit number SCO040517 for its facility located in Roebuck, Spartanburg County, South Carolina (hereafter the "facility"), which constitute violations of Sections 301(a), 308(a) and 402

of the Act, 33 U.S.C. 1311 (a), 1318 (a) and 1342. Plaintiffs seek a declaratory judgment, injunctive relief, the imposition of civil penalties and the award of costs, including attorneys' and expert witness' fees, for defendant's violations of the terms and conditions of its permit, including, but not limited to, the discharge limitations and the monitoring and reporting requirements.

JURISDICTION AND VENUE

2. This Court has subject matter jurisdiction under Section 505(a) of the Act, 33 U.S.C. 1365 (a).

3. On April 10, 1992, plaintiff Friends of the Earth, Inc. (hereafter "FOE"), gave notice of the violations and their intent to file suit to the Administrator of the United States Environmental Protection Agency (hereafter "EPA"), to the South Carolina Department of Health and Environmental Control (hereafter "DHEC"), and to defendant, as required by Section 505(b)(1)(A) of the Act, 33 U.S.C. 1365(b)(1)(A). A copy of this notice is attached as Appendix A.

4. On September 24, 1993, plaintiffs gave notice of additional violations and their intent to file suit to EPA, DHEC, and to defendant (hereafter the "September 1993 Notice"), as required by Section 505(b)(1)(A) of the Act, 33 U.S.C. 1365(b)(1)(A). A copy of the September 1993 Notice is attached as Appendix B.

5. More than 60 days have passed since the September 1993 Notice was served. To the best of plaintiffs' knowledge, EPA has not commenced and is not diligently prosecuting a civil or criminal action concerning the violations alleged in this complaint. While DHEC commenced a civil action in state court concerning these violations on June 9, 1992, this action was commenced at the request of defendant and was not diligently prosecuted. The action was settled

before the suit was filed through a Consent Order and Decree which provided inadequate remedies for defendant's violations of its permit and the Act. Prior to the issuance of the April 10, 1992, notice letter, neither EPA nor DHEC commenced an administrative civil penalty action under Section 309(g)(6) of the Act, 33 U.S.C. 1319(g)(6).

6. Venue is appropriate in the District of South Carolina pursuant to Section 505(c)(1) of the Act, 33 U.S.C. 1365(c)(1), because the violations complained of occurred within this District.

PARTIES

Plaintiffs

7. Plaintiff FOE sues on behalf of itself and its members. FOE is a not-for-profit corporation organized under the laws of the State of New York, with its principal place of business in Washington, D.C. FOE is a membership organization with approximately 40,000 members residing in all states of the United States. FOE is dedicated to the protection and enhancement of the natural resources of this country including air, water and land. More specifically, on the basis of its research on compliance with water pollution control laws, FOE reports to its members about the level of water pollution law violations and FOE's enforcement efforts; proposes legislation to amend the Federal Water Pollution Control Act; and brings litigation against dischargers of pollutants, including dischargers into South Carolina waters, who violate their NPDES permits. FOE's members are greatly concerned about water quality and FOE has a long history of involvement in clean water activities on both the local and national levels. The interests of FOE and its members have been, are being, and will be adversely affected by defendant's

violations of the terms and conditions of its permit.

8. Members of FOE reside in the vicinity of, or own property or recreate in, on or near the waters of the North Tyger River and waters downstream affected by the facility's discharge of pollutants pursuant to defendant's NPDES permit number SCOO40517. The quality of the waters of the State of South Carolina, especially the portions of the North Tyger River and waters downstream affected by the facility's discharge, directly affects the health, economic, recreational, aesthetic and environmental interests of FOE's members. Defendant's discharge of pollutants in violation of its permit number SCOO40517 has adversely affected, is adversely affecting, and will continue adversely to affect, the health, economic, recreational, aesthetic and environmental interests of FOE's members.

9. FOE's ability to protect and improve the waters of South Carolina requires accurate and complete information regarding the discharge of pollutants. Defendant's actions in failing to monitor and report discharges from the facility properly in violation of its permit interfere with efforts of FOE to research the compliance status of South Carolina dischargers with water pollution control laws and report the results of that research to FOE members; propose legislation to amend the Federal Water Pollution Control Act; and bring litigation against defendant to prevent violations of the effluent limitations in defendant's permit and thereby protect the waters of the North Tyger River and waters downstream affected by the facility's discharge. The interests of FOE have been, are being and will be adversely affected by defendant's violation of the terms and conditions of its NPDES permit number SCOO40517.

10. Defendant's actions in failing to monitor and report properly in violation of its permit number SCOO40517 interfere with efforts of FOE's members to protect their health,

economic, recreational, aesthetic and environmental interests by interfering with their ability to take action on their own behalf. Defendant's actions further interfere with FOE's efforts on behalf of its members to research the status of compliance of South Carolina dischargers with water pollution control laws and report the results of that research to FOE members; propose legislation to amend the Federal Water Pollution Control Act; and bring litigation against defendant to prevent violations of the effluent limitations in defendant's permit and thereby protect the waters of the North Tyger River and waters downstream affected by the facility's discharge. Defendant's violations of the monitoring and reporting requirements of its NPDES permit number SCOO40517 have adversely affected, are adversely affecting, and will continue adversely to affect the health, economic, recreational, aesthetic and environmental interests of FOE's members.

11. Plaintiff Citizens Local Environmental Action Network, Inc. (hereafter "CLEAN") sues on behalf of itself and its members. CLEAN is a not-for-profit corporation organized under the laws of the State of South Carolina, with its principal place of business in Columbia, South Carolina. CLEAN is a statewide coalition representing 30 groups and individual members dedicated, among other things, to protecting and improving the quality of the waters of South Carolina. CLEAN is committed to protecting and improving the quality of South Carolina's streams, lakes and rivers. More specifically, CLEAN reports to its members, the citizens of South Carolina, and the South Carolina legislature about the condition of South Carolina waters and enforcement efforts by regulatory agencies; testifies before DHEC, the South Carolina Land Resources Conservation Commission, and the South Carolina legislature on efforts to protect the quality of South Carolina waters; submits comments on draft NPDES permits which allow discharges to South Carolina waters; proposes state

legislation to protect South Carolina waters; and brings litigation against dischargers of pollutants into South Carolina waters who violate their NPDES permits. The interests of CLEAN and its members have been, are being and will be adversely affected by defendant's violation of the terms and conditions of its NPDES permit number SCOO40517.

12. Members of CLEAN reside in the vicinity of, or own property or recreate in, on or near the waters of the North Tyger River and waters downstream affected by the facility's discharge of pollutants pursuant to defendant's NPDES permit number SCOO40517. The quality of the waters of the State of South Carolina, especially the portions of the North Tyger River and waters downstream affected by the facility's discharge, directly affects the health, economic, recreational, aesthetic and environmental interests of CLEAN's members. Defendant's discharge of pollution in violation of its permit has adversely affected, is adversely affecting, and will continue adversely to affect the health, economic, recreational, aesthetic and environmental interests of CLEAN's members.

13. CLEAN's ability to protect and improve the waterways of South Carolina requires accurate and complete information regarding the discharge of pollutants. Defendant's actions in failing to monitor and report discharges from the facility properly in violation of its permit interfere with efforts of CLEAN to research the status of compliance of South Carolina dischargers with water pollution control laws and report the results of that research to CLEAN members, the public and the South Carolina legislature; submit comments on water pollution control regulations; lead efforts to protect South Carolina waters; submit comments on NPDES permits; and bring litigation against defendant to prevent violations of the effluent limitations in defendant's permit and thereby protect the waters of the North Tyger River and waters downstream affected by the facility's discharge. The interests of CLEAN

have been, are being and will be adversely affected by defendant's violation of the terms and conditions of its NPDES permit number SCOO40517.

14. Defendant's actions in failing to monitor and report properly in violation of its permit number SCOO40517 interfere with efforts of CLEAN's members to protect their health, economic, recreational, aesthetic and environmental interests by interfering with their ability to take action on their own behalf. Defendant's actions further interfere with CLEAN's efforts on behalf of its members to research the status of compliance of South Carolina dischargers with water pollution control laws and report the results of that research to CLEAN members, the public and the South Carolina legislature; testify before state agencies and the state legislature; submit comments on NPDES permits; and bring litigation against defendant to prevent violations of the effluent limitations in defendant's permit and thereby protect the waters of the North Tyger River and waters downstream affected by the facility's discharge. Defendant's violations of the monitoring and reporting requirements of its NPDES permit number SCOO40517 have adversely affected, are adversely affecting, and will continue adversely to affect the health, economic, recreational, aesthetic and environmental interests of CLEAN's members.

15. Plaintiff Sierra Club sues on behalf of itself and its members. The Sierra Club is a not-for-profit corporation organized under the laws of the State of California, with its principal place of business in San Francisco, California. The Sierra Club is a membership organization with approximately 600,0000 members residing in all states of the United States. The Sierra Club is dedicated to the protection and enhancement of the natural resources of this country including air, water and land. More specifically, on the basis of its research on compliance with water pollution control laws, the Sierra Club

reports to its members about the level of water pollution law violations and the Sierra Club's enforcement efforts; proposes legislation to amend the Federal Water Pollution Control Act; and brings litigation against dischargers of pollutants, including dischargers into South Carolina waters, who violate their NPDES permits. The Sierra Club's members are greatly concerned about water quality and the Sierra Club has a long history of involvement in clean water activities on both the local and national levels. The interests of the Sierra Club and its members have been, are being, and will be adversely affected by defendant's violations of the terms and conditions of its permit.

16. Members of the Sierra Club reside in the vicinity of, or own property or recreate in, on or near the waters of the North Tyger River and waters downstream affected by the facility's discharge of pollutants pursuant to defendant's NPDES permit number SC0040517. The quality of the waters of the State of South Carolina, especially the portions of the North Tyger River and waters downstream affected by the facility's discharge, directly affects the health, economic, recreational, aesthetic and environmental interests of the Sierra Club's members. Defendant's discharge of pollutants in violation of its permit number SC0040517 has adversely affected, is adversely affecting, and will continue adversely to affect, the health, economic, recreational, aesthetic and environmental interests of the Sierra Club's members.

17. The Sierra Club's ability to protect and improve the waters of South Carolina requires accurate and complete information regarding the discharge of pollutants. Defendant's actions in failing to monitor and report discharges from the facility properly in violation of its permit interfere with efforts of the Sierra Club to research the compliance status of South Carolina dischargers with water pollution control laws and report the results of that research to Sierra Club members;

propose legislation to amend the Federal Water Pollution Control Act; and bring litigation against defendant to prevent violations of the effluent limitations in defendant's permit and thereby protect the waters of the North Tyger River and waters downstream affected by the facility's discharge. The interests of the Sierra Club have been, are being and will be adversely affected by defendant's violation of the terms and conditions of its NPDES permit number SC0040517.

18. Defendant's actions in failing to monitor and report properly in violation of its permit number SC0040517 interfere with efforts of the Sierra Club's members to protect their health, economic, recreational, aesthetic and environmental interests by interfering with their ability to take action on their own behalf. Defendant's actions further interfere with the Sierra Club's efforts on behalf of its members to research the status of compliance of South Carolina dischargers with water pollution control laws and report the results of that research to Sierra Club members; propose legislation to amend the Federal Water Pollution Control Act; and bring litigation against defendant to prevent violations of the effluent limitations in defendant's permit and thereby protect the waters of the North Tyger River and waters downstream affected by the facility's discharge. Defendant's violations of the monitoring and reporting requirements of its NPDES permit number SC0040517 have adversely affected, are adversely affecting, and will continue adversely to affect the health, economic, recreational, aesthetic and environmental interests of the Sierra Club's members.

Defendant

19. Defendant Laidlaw Environmental Services (TOC), Inc., is a private corporation organized under the laws of the State of South Carolina. Defendant is doing business in

Roebuck, Spartanburg County, South Carolina, where it operates the facility.

FACTS

20. Pursuant to Section 402 of Act, DHEC issued NPDES permit number SC0040517 to defendant for the facility on December 15, 1986. The permit authorizes defendant to discharge limited quantities of pollutants from the facility into the North Tyger River. The North Tyger River is a navigable water of the United States.

21. Section 308 of the Act, 33 U.S.C. 1318. authorizes the Administrator to require NPDES permittees to establish and maintain records; install, use and maintain monitoring equipment, sample effluents; and report on a regular basis to the permit-issuing agency regarding defendant's discharge of pollutants. The reports consist of discharge monitoring reports (hereafter "DMRs") and noncompliance reports (hereafter "NCRs").

22. Defendant has submitted DMRs and NCRs to DHEC since at least April 1987. Defendant has also prepared laboratory reports reflecting its monitoring results and daily logs showing mercury concentrations since at least April 1987. Appendix A, plaintiffs' Notice of Intent to Sue of April 10, 1992, and Appendix B, plaintiffs' Notice of Intent to Sue of September 24, 1993, list numerous violations of the effluent limitations and monitoring and reporting requirements which have been taken from the DMRs and NCRs submitted by defendant pursuant to NPDES permit number SCOO40517 and from defendant's laboratory reports and mercury logs. Appendices A and B are incorporated herein by reference.

23. Defendant's violations of the Act have been numerous and repeated. Over the almost seven-year period covered by Appendices A and B, defendant violated the terms

and conditions of its permit at least 2300 times. Because of this extensive history of violations of the terms and conditions of NPDES permit numbers SCOO40517, plaintiffs believe and allege that defendant may have violated its permit on additional occasions prior to, during, and subsequent to the period of the violations listed in Appendices A and B.

24. Because of this extensive history of violations of the effluent standards and limitations imposed by defendant's NPDES permit number SCOO40517, plaintiffs believe and allege that, without the imposition of appropriate civil penalties and the issuance of an injunction, defendant will continue to violate its permit to the further injury of plaintiffs, their members and other members of the public.

CLAIM

25. Section 301(a) of the Federal Water Pollution Control Act, 33 U.S.C. 1311(a), prohibits the discharge of pollutants from a point source into navigable waters of the United States, unless in compliance with various enumerated sections of the Act. Section 301(a) prohibits, inter alia, such discharges not authorized by, or in violation of, the terms and conditions of an NPDES permit issued pursuant to Section 402 of the Act, 33 U.S.C. 1342. Section 402(k) provides that compliance with the terms and conditions of a permit issued pursuant to that section shall be deemed compliance with, inter alia, Section 301 of the Act.

26. Pursuant to Sections 308 and 402 of the Federal Water Pollution Control Act, 33 U.S.C. 1318 and 1342, defendant's NPDES permit number SCOO40517 requires it to monitor the facility's discharge and to report monitoring and sampling information regarding its discharge.

27. Sections 305(a) and 305(f)(6) of the Federal Water Pollution Control Act, 33 U.S.C. 1365(a) and 1365(f)(6),

authorize citizens to enforce "a permit or condition thereof," including the effluent limitations and monitoring and reporting requirements of an NPDES permit.

28. Defendant has failed in numerous instances, including, but not limited to, those listed in Appendix A, the reporting and monitoring violations listed in Appendix B, and discharge violations 31-32 and 34-1044 in Appendix B, to comply with NPDES permit number SCOO40517, including failures to comply with the effluent limitations and to monitor and report its discharge properly. As a result, it has violated Sections 301, 308 and 402 of the Act, 33 U.S.C. 1311, 1318 and 1342.

RELIEF

Wherefore, plaintiffs respectfully request this Court to grant the following relief:

A. Issue a declaratory judgment that defendant has violated, and continues to be in violation of, Sections 301, 308 and 402 of the Federal Water Pollution Control Act, 33 U.S.C. 1311, 1318 and 1342;

B. Enjoin defendant from operating its facility in such a manner as will result in the further violation of NPDES permit number SCOO40517 and Sections 301, 308 and 402 of the Act, 33 U.S.C. 1311, 1318 and 1342;

C. Order defendant to comply with all effluent limitations, monitoring and reporting requirements, and other terms and conditions of NPDES permit number SCOO40517;

D. Order such other injunctive relief as the Court deems appropriate, including restitution and mitigation;

E. Order defendant to provide plaintiffs with a copy of all monitoring results, reports and other documents which defendant submits to the federal or state government

regarding NPDES permit number SCOO40517 at the time they are submitted to these authorities and all monitoring results which are not submitted to the federal or state government within 10 days of their receipt by defendant;

F. Order defendant to pay appropriate civil penalties for each violation of NPDES permit number SCOO40517, pursuant to Sections 309(d) and 505(a) of the Act, 33 U.S.C. 1319(d) and 1365(a), including those listed in Appendix A, the reporting and monitoring violations listed in Appendix B, the discharge violations 31-32 and 34-1044 in Appendix B, and all violations committed by defendant in addition to those listed in Appendices A and B;

G. Award plaintiffs their costs, including reasonable attorneys' and expert witness' fees, as authorized by Section 505(d) of the Act, 33 U.S.C. 1365(d); and

H. Award such other relief as this Court deems appropriate.

Respectfully submitted,

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(803) 252-1419

Counsel for Plaintiffs

November 24, 1993

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

FRIENDS OF THE EARTH, INC.,
218 D Street, S.E.
Washington, D.C. 20003
(202) 544-2600

and

CITIZENS LOCAL ENVIRONMENTAL ACTION NETWORK, INC.
P.O. BOX 50529
Columbia, South Carolina 29250

and

SIERRA CLUB
730 Polk Street
San Francisco, California 94109

Plaintiffs,

v.

LAIDLAW ENVIRONMENTAL SERVICES (TOC) INC.,
100 Executive Center Drive
Santee Building, Suite 128
Columbia, South Carolina 29210

Defendant.

Civil No. 3-92-1697-17

ANSWER TO AMENDED COMPLAINT

COMES NOW, Laidlaw Environmental Services (TOC), Inc., Defendant herein, and hereby files and serves its Answer To Plaintiffs' Amended Complaint as follows:

FIRST DEFENSE

Defendant answers the numbered paragraphs of Plaintiffs' Amended Complaint as follows:

1.

Answering paragraph 1 of the Amended Complaint, Defendant admits that Plaintiffs purport to bring this action pursuant to Section 505 of the Federal Water Pollution Control Act, as amended, 33 U.S.C. § 1365. Defendant denies that Plaintiffs are entitled to maintain this action and Defendant further denies all remaining allegations contained in said paragraph.

2.

Defendant denies each and every allegation contained in paragraph 2 of the Amended Complaint.

3.

Answering paragraph 3 of the Amended Complaint, Defendant admits that it received a letter from Plaintiff Friends of the Earth ("FOE") dated April 10, 1992, which purported to give Defendant sixty days notice of FOE's intent to sue. Defendant denies that a copy of this notice was attached as an appendix to the proposed Amended Complaint received by Defendant. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in said paragraph.

4.

Answering paragraph 4 of the Amended Complaint, Defendant admits that more than sixty days passed between the date that FOE's notice was purportedly sent to Defendant and the date Plaintiffs' proposed Amended Complaint was received by Defendant. Further answering, Defendant admits that the United States Environmental Protection Agency ("EPA") has not commenced any administrative, civil, or criminal action against Defendant. Further answering, Defendant admits that the South Carolina Department of Health and Environmental Control ("DHEC") commenced a civil action in State Court against Defendant on June 9, 1992, and that a Consent Order and Decree was entered in that civil action on June 10, 1992. Defendant denies all remaining allegations contained in said paragraph.

5.

Answering paragraph 5 of the Amended Complaint, Defendant admits that venue is appropriate in this Court. Defendant denies all remaining allegations contained in said paragraph.

6.

Answering paragraph 6 of the Amended Complaint, Defendant denies that the interests of FOE or its members have been, are being, or will be, adversely affected by any alleged violations of Defendant's NPDES permit. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in said paragraph.

7.

Answering paragraph 7 of the Amended Complaint, Defendant denies that the health, economic, recreational, aesthetic and/or environmental interests of FOE's members have been adversely affected, are being adversely affected, or will be adversely affected, by any alleged violations of Defendant's NPDES permit. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in said paragraph.

8.

Answering paragraph 8 of the Amended Complaint, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the first sentence of said paragraph. Defendant denies all remaining allegations contained in said paragraph.

9.

Defendant denies each and every allegation contained in paragraph 9 of the Amended Complaint.

10.

Answering paragraph 10 of the Amended Complaint, Defendant denies that the interests of CLEAN or its members have been, are being, or will be, adversely affected by any alleged violations of Defendant's NPDES permit. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in said paragraph.

11.

Answering paragraph 11 of the Amended Complaint, Defendant denies that the health, economic, recreational, aesthetic, and/or environmental interests of CLEAN's members have been adversely affected, are being adversely affected, or will be adversely affected by any alleged violations of the Defendant's NPDES permit. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in said paragraph.

12.

Answering paragraph 12 of the Amended Complaint, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the first sentence of said paragraph. Defendant denies all remaining allegations contained in said paragraph.

13.

Defendant denies each and every allegation contained in paragraph 13 of the Amended Complaint.

14.

Answering paragraph 14 of the Amended Complaint, Defendant denies that the interests of the Sierra Club or its members have been, are being, or will be, adversely affected by any alleged violations of Defendant's NPDES permit. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in said paragraph.

15.

Answering paragraph 15 of the Amended Complaint, Defendant denies that the health, economic, recreational, aesthetic, and/or environmental interests of the Sierra Club's members have been adversely affected, are being adversely affected, or will be adversely affected, by any alleged violations of Defendant's NPDES permit. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in said paragraph.

16.

Answering paragraph 16 of the Amended Complaint, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the first sentence of said paragraph. Defendant denies all remaining allegations contained in said paragraph.

17.

Defendant denies each and every allegation contained in paragraph 17 of the Amended Complaint.

18.

Defendant admits the allegations contained in paragraph 18 of the Amended Complaint.

19.

Answering paragraph 19 of the Amended Complaint, Defendant admits that DHEC has issued an NPDES permit to Defendant to discharge treated effluent into the North Tyger

River. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in said paragraph.

20.

Answering paragraph 20 of the Amended Complaint, Defendant admits the first sentence of said paragraph, which is merely a summary of portions of Section 308 of the Act. Further answering, Defendant admits that reports submitted to DHEC consist both of discharge monitoring reports (DMRs) and non-compliance reports (NCRs).

21.

Answering paragraph 21 of the Amended Complaint, Defendant admits that it has submitted DMRs and NCRs since at least January, 1990. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations regarding appendices A and B, since no such appendices were attached to the proposed Amended Complaint Defendant received from Plaintiffs. Further answering, to the extent said appendices are similar or identical to those attached to Plaintiff's original Complaint, which was filed with this Court on June 12, 1992, Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegation that information contained in those appendices was taken directly from DMRs and NCRs submitted by Defendant to DHEC. Defendant denies all remaining allegations contained in said paragraph.

22.

Answering paragraph 22 of the Amended Complaint,

Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations regarding information purportedly reported on Appendix B to the Amended Complaint, since no such appendix was attached to the proposed Amended Complaint received by Defendant. Defendant denies all remaining allegations contained in said paragraph.

23.

Defendant denies each and every allegation contained in paragraph 23 of the Amended Complaint.

24.

Answering paragraph 24 of the Amended Complaint, Defendant admits that said paragraph summarizes certain portions of Sections 301 and 402 of the Act.

25.

Answering paragraph 25 of the Amended Complaint, Defendant admits that its NPDES permit contains several elements and sets forth several conditions, including certain monitoring and reporting requirements.

26.

Defendant denies each and every allegation contained in paragraphs 26 and 27 of the Amended Complaint.

27.

Defendant denies that Plaintiffs are entitled to any relief

whatsoever, including that specifically requested in paragraphs A through H of the Prayer for Relief.

28.

Further answering, Defendant expressly denies each and every allegation contained in the Amended Complaint that has not been admitted, denied, or otherwise responded to in this Answer.

SECOND DEFENSE

Plaintiffs' Amended Complaint fails to state a claim upon which relief can be granted.

THIRD DEFENSE

Plaintiffs' claims are barred, in whole or in part, by the applicable statute(s) of limitations.

FOURTH DEFENSE

Plaintiff's Amended Complaint should be dismissed for insufficiency of service of process.

FIFTH DEFENSE

Plaintiffs' claims are barred for lack of standing.

SIXTH DEFENSE

Plaintiffs' claims are barred under Section 505(b) of the Act by reason of a prior civil action filed by DHEC and a judicial decree entered thereon by the Court of Common Pleas,

Spartanburg County, South Carolina, Civil Action No. 92-CP-42-1429, covering each and every claim raised by Plaintiffs in their Amended Complaint.

SEVENTH DEFENSE

Alternatively, Plaintiffs' claims are barred by Section 505(b) of the Act because DHEC has commenced and is diligently prosecuting a civil action in the Court of Common Pleas, Spartanburg County, South Carolina, Civil Action No. 92-CP-42-1429, to require compliance with the NPDES permit that is the subject of Plaintiffs' lawsuit.

EIGHTH DEFENSE

The claims of Plaintiffs CLEAN and Sierra Club are barred by lack of subject matter jurisdiction because neither of these organizations provided written notice of their intent to sue as required by Section 505(b) of the Act.

NINTH DEFENSE

Alternatively, the claims of CLEAN and Sierra Club should be dismissed for their failure to comply with the condition precedent of providing written notice of their intent to sue as required by Section 505(b) of the Act.

Respectfully submitted,

OGLETREE, DEAKINS, NASH,
SMOAK AND STEWART

_____

Michael S. Thwaites

Ronald E. Cardwell
Federal I.D. No. 5038

[CERTIFICATE OF SERVICE OMITTED]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Friends of the Earth, et al,	)	
	)	C/A No. : 3:92-1697-17
Plaintiffs,	)	
v.	)	
	)	ORDER
Laidlaw Environmental Services,	)	
	)	
Defendant.	)	
	)	

Plaintiffs Friends of the Earth, Inc. ("FOE") and Citizens Local Environmental Action Network ("CLEAN") brought this action against defendant Laidlaw Environmental Services, Inc. ("TOC") as a citizens suit under Section 505 of the Federal Water Pollution Control Act, as amended, commonly known as the Clean Water Act (the "Act"). Subsequent to the filing and service of the complaint, plaintiff Sierra Club sought to join this action as a named plaintiff by virtue of an amended complaint which was filed on July 20, 1992.

TOC owns and operates a hazardous waste incinerator in Roebuck, South Carolina, and as part of that facility, operates a wastewater treatment system. The South Carolina Department of Health and Environmental Control ("DHEC") authorized the facility to discharge treated wastewater into the North Tyger River in accordance with a National Pollutant Discharge Elimination System ("NPDES") permit issued on December 15, 1986. The NPDES permit was modified on December 14, 1989, and on July 23, 1990. Although the NPDES permit expired on December 31, 1991, TOC made a timely application for renewal of the NPDES permit and therefore continues to operate under the terms of the NPDES

permit, as modified, pending renewal. Plaintiffs allege that wastewater discharges by TOC violated and continue to violate the terms and conditions of TOC's NPDES permit.

FOE notified TOC by letter dated April 10, 1992, that it intended to file a citizens suit under § 505 of the Clean Water Act based upon TOC's violations of its permit limits. On June 9, 1992, three days before the sixty day notice period was to expire,[1] DHEC commenced a civil action in state court against TOC. The state civil action was based upon the same violations of permit limits as those alleged by Friends in its notice letter and complaint. The state civil action was settled and a consent order and decree was entered between DHEC and TOC on June 10, 1992. Friends commenced this suit on June 12, 1992.

The matter is now before the court upon four motions:

1) TOC's motion to strike the amended complaint, joining Sierra Club as a new plaintiff, and to strike all related pleadings for failing to comply to Rules 15 and 21, Fed. R. Civ. P. ;

2) TOC's motion to dismiss pursuant to Rule 12(b)(1), Fed. R. Civ. P. , all claims brought by CLEAN and Sierra Club for lack of subject matter jurisdiction due to their failure to provide the statutorily required sixty-day notice of intent to file suit; and

3) TOC's motion to dismiss for failing to state a claim for which relief can be granted, upon the grounds that this action is precluded by the state court action brought by DHEC against TOC.

---

[1] Before a citizens suit can be brought under the Clean Water Act, notice of alleged permit violations must be provided to the alleged violator, DHEC and the EPA. 33 U. S. C. § 1365(b).

4) Plaintiffs' motion for a preliminary injunction to enjoin TOC from violating its NPDES permit.

The court conducted a hearing on all four motions at the University of South Carolina School of Law on November 19, 1992. At the conclusion of the hearing, the court took all four motions under advisement and scheduled a visit to the Roebuck hazardous waste incinerator. The court, along with representatives of both parties, conducted its tour of the incinerator on December 3, 1992.

TOC's Motion To Strike Pursuant to Rule 21 Because Of A Defective Amendment To The Complaint

This action was initially filed by two plaintiffs, FOE and CLEAN. Thereafter, an amended complaint was filed purporting to add the Sierra Club as a third plaintiff. The amendment was made pursuant to Fed. R. Civ. P. 15(a), which generally provides that a party may amend, as a matter of right, at any time before a responsive pleading is served. After the complaint was filed, TOC filed its motion to strike, which is technically not a "responsive pleading. " *Smith v. Blackledge*, 451 F. 2d 1201, 1203 n. 2 (4th Cir. 1971). Therefore, plaintiffs sought to act pursuant to Rule 15(a) when they amended the complaint to add the Sierra Club. However, the more liberal requirements of Rule 15 clearly conflict with the requirements of Fed. R. Civ. P. 21, regarding joinder of additional parties. Rule 21 provides for the addition of parties "*by order of the court* on motion of any party or of its own initiative. " Fed. R. Civ. P. 21 (emphasis added). Several courts, including the Fourth Circuit, have held that Rule 21 is controlling when there exists a conflict between Rule 21 and 15. *See Age of Majority Educational Corp. v. Preller*, 512 F. 2d 1241 (4th Cir. 1975); *see also* 6 Charles

A. Wright, ET AL., *Federal Practice and Procedure* § 1479, at 570 (1990). Accordingly, Rule 21 applies and therefore the effort to join Sierra Club as a co-plaintiff, without first securing the approval of the court, was inappropriate. At oral argument, the court indicated its tentative conclusion on this issue, and invited the parties to orally move to join the Sierra Club pursuant to Rule 21. The two remaining plaintiffs promptly made such a motion which was granted by the court. Therefore, although the court agrees with TOC that the earlier amendment was invalid, the court hereby grants the motion of FOE and CLEAN to add the Sierra Club as an additional plaintiff.

TOC's Motion To Dismiss Pursuant To Rule 12(b)(1) For Lack Of Subject Matter Jurisdiction

TOC moves to dismiss all claims brought by CLEAN and Sierra Club for lack of subject matter jurisdiction. Specifically, TOC points out that FOE was the only one of the three plaintiffs to formally notify TOC of its intention to file suit after the expiration of sixty days. CLEAN and the Sierra Club did not join in the letter. Compliance with the notice requirement of § 505(b) is a jurisdictional prerequisite to bringing suit. *See National Environmental Foundation v. ABC Rail Corp.*, 926 F. 2d 1096, 1097-98 (11th Cir. 1991). The court is thus presented with the question of whether the sixty day notice requirement of the Clean Water Act requires that *each* individual plaintiff separately provide written notice before joining in an action.

This issue was directly addressed by this court in *South Carolina Wildlife Federation v. Alexander*, 457 F. Supp. 118, 124 (D. S. C. 1978), which held that notice provided by one of several plaintiffs constituted substantial compliance with the Clean Water Act. Judge Chapman reasoned that since the

omission of some of the plaintiffs from the notice "would in no way fail to put the defendants on notice as to the nature of the suit or the basis on which it was to be brought . . . defendants have not been prejudiced by this omission . . . ." *Id.* at 123-24. Other district courts have followed Judge Chapman's decision. *See Student Public Interest Research Group v. AT&T Bell Laboratories*, 617 F. Supp. 1190, 1194 (D. N. J. 1986); *Student Public Interest Group v. Tenneco Polymers, Inc.*, 602 F. Supp. 1394, 1396 (D. N. J. 1985).

As in *Alexander*, the defendant can show no prejudice resulting from the failure of CLEAN and the Sierra Club to join in the sixty day notice letter. The claims brought by all three plaintiffs in their complaint are exactly the same claims predicted in the notice letter. Finding no prejudice to the defendant, the court denies the motion to dismiss.

TOC's Motion To Dismiss Pursuant To Rule 12(b)(6) Because Of The Earlier DHEC Civil Action

The Clean Water Act makes unlawful the discharge of any pollutant into navigable waters except pursuant to a permit system established by the Act. 33 U. S. C. § 1311. Section 402(a) of the Clean Water Act, 33 U. S. C. § 1342(a), provides that the EPA may issue NPDES permits authorizing effluent discharges of pollutants into navigable waters. Section 402(a) further provides that effluent discharges shall be specified in the NPDES permit. Section 402(b) allows each state to develop and administer its own NPDES permit program provided the program meets federal requirements. DHEC is the South Carolina agency which administers the NPDES permit program.

Section 505(a) of the Act, 33 U. S. C. § 1365(a), authorizes citizens to commence civil actions against alleged violators of NPDES permits subject, however, to certain

limitations. Before the citizen suit can be commenced, the citizen, here FOE, must give notice of the violations to the alleged violator, DHEC, and the EPA. The citizen suit may then be filed no sooner than 60 days after such notice has been given. 33 U. S. C. § 1365(b). However, a citizen suit may not be commenced if DHEC "has commenced and is diligently prosecuting a civil or criminal action" in a state court "to require compliance with the standard,limitation, or order. " 33 U. S. C. § 1365(b)(1)(B).

In the present case, TOC's position is that DHEC's civil action commenced on June 9, 1992, which resulted in a consent order filed the next day, on June 10, 1992, precludes this suit, which FOE filed on June 12, 1992. In support of their argument, TOC cites *Gwaltney v. Chesapeake Bay Foundation, Inc.* 484 U. S. 49, 60 (1987), in which the Supreme Court explained that under the Act, citizen suits were intended to supplement rather than to supplant government action and that citizen suits are proper only "if the Federal, State, and local agencies fail to exercise their enforcement responsibility. " The *Gwaltney* Court further noted that the 60-day notice period was designed to enable governmental agencies to respond by initiating actions against the alleged polluter. "If the . . . State commences enforcement action within that 60-day period, the citizen suit is barred, presumably because governmental action has rendered it unnecessary. " 484 U. S. at 59.

TOC also argues that public policy considerations weigh in favor of barring citizen suits once a governmental agency brings an action to force compliance with the Act. TOC asserts that the most significant deleterious impact of allowing citizen suits to proceed concurrently or subsequent to governmental action is that allowing citizens dissatisfied with the terms of a settlement between an alleged polluter and a governmental agency to institute a citizen suit any time after

settlement would undermine agency authority to regulate water pollution. Therefore, TOC argues that an alleged polluter's incentive to settle would be greatly diminished. TOC further argues that to allow citizen suits in such situations would expose alleged polluters to duplicative prosecutions for the same violations and potentially to conflicting court orders to enforce the same NPDES permit limits.

It appears that the critical determination with regard to this issue is whether DHEC "diligently prosecuted" its enforcement action against TOC. Defendant reads the diligent prosecution provision of section 505(b)(1)(B) of the Clean Water Act as not applicable in situations such as the one presented here, where the government commences an action within the 60-day notice period and prior to the commencement of a citizen suit. However, this seems to be a rather tortured reading of the statute. Instead, plaintiffs' interpretation of this section makes more sense: the government's lawsuit must meet two conditions in order to bar a citizen suit; it must be commenced before the citizen suit is filed and it must be (or have been) diligently prosecuted.

Thus, plaintiffs assert that DHEC's lawsuit brought during the 60-day notice period would bar plaintiff's suit only if it has been "diligently prosecuted." Plaintiffs assert that TOC's drafting of the DHEC complaint and consent order, the lenient penalties imposed for the NPDES permit violations, and the swift settlement of the DHEC action demonstrate a lack of diligent prosecution.

Defendant counters that DHEC did diligently prosecute its action. TOC points out that the enforcement action against TOC began some three to four months before DHEC's complaint was filed. TOC further asserts that the consent order eventually entered into between DHEC and TOC was the result of three to four days of intensive negotiations. TOC also takes issue with the plaintiffs assertion that the $100,000

penalty imposed is lenient.

The court will deny TOC's motion to dismiss grounded upon the assertion that the DHEC litigation precludes this suit. Although the parties take contrasting positions on the validity of the DHEC prosecution, DHEC representatives were noticeably absent from the oral argument held on December 2. It appears to the court that factual issues must be resolved to determine whether DHEC "diligently prosecuted" its action against TOC before the court can decide whether the DHEC action bars plaintiffs' suit. A determination of this factual question will necessarily involve some of the same factual issues that will be presented if and when this case is heard on its merits. The court will thus be faced with the question of whether to conduct a separate evidentiary hearing on the issue of whether DHEC diligently prosecuted the state court action or whether such a determination should be made in the context of an overall determination of this action on its merits. The parties are invited to file submissions with the court setting forth their positions as to whether a separate evidentiary hearing on this one issue is appropriate. Factors which should be addressed in any such submissions should include, but are not limited to, the burden and expense of separate hearings on the litigants and the conservation of judicial resources.

Plaintiffs' Motion For A Preliminary Injunction

The four-factor standard for a preliminary injunction is well established in this circuit. The court must examine:

1) the likelihood of irreparable harm to the movant if the preliminary injunction is denied,

2) the likelihood of irreparable harm to the non-movant if the requested relief is granted,

3) the likelihood that the movant will succeed on the merits, and

4) the public interest.

National Resources Defense Council v. Watkins, 954 F. 2d 974, 981 (4th Cir. 1992). The court will address these issues seriatim.

1) The Likelihood Of Irreparable Harm To The Plaintiffs

In attempting to carry the burden of showing irreparable harm, the plaintiffs rely on affidavits of individuals who live [illegible] the river and further point to the alleged permit violations as themselves evidence of irreparable injury. The court has carefully reviewed the affidavits of the individuals who live on or near the river in question and find that they do not establish irreparable injury.

As to the second proposition, even if this court assumes for purposes of argument that violations have occurred and are continuing to occur, these violations alone do not necessarily mean that plaintiffs are entitled to a preliminary injunction. The Supreme Court cases of *Weinberger v. Romero-Barcelo*, 456 U. S. 305 (1982), and *Amoco Production Co. v. Village of Gambell, Alaska*, 480 U. S. 531 (1987) hold that procedural or technical violations of the Clean Water Act will not support an injunction. The best illustration of this point is the case cited by plaintiffs for the appropriate standard for a preliminary injunction, *Natural Resources Defense Council, Inc. v. Watkins*, 954 F. 2d 974 (4th Cir. 1992). If plaintiffs could rely solely on the existence of permit violations, there would be no need for *Watkins* articulation and application of a four-part standard of plaintiffs' burden of proof.

Significantly, in *Watkins*, the NRDC actually presented an expert affidavit on the issue of environmental harm. The

court found the affidavit sufficient to raise a factual issue on the question of standing, but "far from sufficient to prove the existence of irreparable environmental damage. " *Id.* at 983.

In contrast to plaintiffs' failure to offer evidence of environmental harm, TOC offers the affidavit of Michael W. Marlowe, summarizing evidence TOC has assembled to show that TOC's emissions have not caused harm to the environment. Pursuant to the June 10, 1992 Consent Order, TOC, through RMT, Inc. , conducted an investigation of mercury levels in fish tissues for the North and Middle Tyger Rivers in Spartanburg County. Aff. of Marlowe, ¶4. The investigation was conducted according to a workplan reviewed and approved by DHEC. Aff. of Marlowe, ¶4. The report concluded there was no significant difference in the mercury concentration in fish tissues collected above and downstream of TOC's discharge location. Aff. of Marlowe, ¶4.

TOC has also conducted, through Shealy Environmental Consultants, Inc. , 96-hour flow-through bioassays on TOC's plant which indicated that the effluent was not acutely toxic to the fish tested. Aff. of Marlowe, ¶5. Moreover, Shealy has performed aquatic macroinvertebrate assessments of the North Tyger River and determined that the effluent is having little or no toxic effect on the aquatic macroinvertebrate community. Aff. of Marlowe, ¶6.

Therefore, as in *Watkins*, plaintiffs have failed to offer sufficient evidence while TOC has offered contrary evidence on the issue of irreparable harm to plaintiffs. Accordingly, plaintiffs have, at this juncture at least, failed to carry their burden of showing irreparable harm.

2. Likelihood Of Irreparable Harm To The Defendant

Plaintiffs contend that TOC would suffer only economic harm which would not be overwhelming to TOC if

the injunction is improperly granted. TOC counters that it has spent over $900,000 in an effort to improve its compliance with its permit. Conceding that "a few" problems need to be resolved, TOC contends, in its brief, that an injunction at this stage would likely force the facility to close. However, at oral argument, when afforded the opportunity to present sworn testimony over the possibility of plant closure in the event of an injunction, TOC declined to offer such testimony. Thus, the court does not accept TOC's assertion that it would be forced to close its doors if the injunction were to be granted. The court does recognize, however, a degree of economic harm, which may be insignificant in terms of TOC's overall financial base, which would inure to TOC if injunctive relief were granted. Accordingly, this factor does not militate strongly against the award of an injunction.

3. Likelihood Of Success On The Merits

Plaintiffs, pointing to what they contend to be undisputed permit violations which continue to occur, confidentially predict that they "will almost certainly succeed on the merits."

Defendants cling fast to their position that the DHEC litigation forecloses any citizens suit such as this, and that the defendants will certainly prevail on the merits. The court is of the opinion that both sides have overstated the strength of their respective positions. As noted above, permit violations alone may not be sufficient to entitle the plaintiffs to the injunctive relief they seek. Additionally, the fact that DHEC has filed suit and settled that same action the next day does not necessarily mean this action is barred if this court later determines that the DHEC action was not diligently prosecuted.

Accordingly, the court finds that neither party has made a substantial showing of likelihood of success on the merits, the

evidence to this point being in equipoise. Accordingly, since plaintiffs fail to carry their burden, this factor militates against the award of injunctive relief.

4. The Public Interest

The plaintiffs contend that the public interest in a clean environment is paramount. The defendants counter that the plaintiffs cannot rely on this interest when they have presented no evidence of no real environmental harm, as noted above. Defendant contend that the public interest in a clean environment does not extend to the unreasonable degree of making all other economic interests subservient to plaintiffs' desire for a clean environment. Defendant further contend that there is an additional public interest which must be considered - the interest in governmental enforcement of environmental policy over multiple private actions seeking enforcement by citizens. Finally, TOC contends that there is a public interest in TOC's continued operation. TOC is a hazardous waste incinerator. As such, it performs a desirable societal function in treating and disposing of hazardous waste.

As noted above, the court is not prepared to accept TOC's contention that it will be forced to close if an injunction is granted. Accordingly, although the public definitely has an interest in the continued operation of the facility, TOC has been unable to show that this interest would be adversely affected by a preliminary injunction. All of the other public interests asserted by the parties appear to be legitimate and present in this case. However, as these public interests "cut both ways," plaintiffs have not made a sufficiently strong showing in regard to this factor, and thus this factor militates against the issuance of an injunction.

In summary, the plaintiffs have not come forward with a strong enough showing on the likelihood of irreparable

injury. Aside from increased operating costs, the defendant has not demonstrated substantial injury to itself if the injunction is granted. The likelihood of success on the merits is uncertain at this point, and the public has interests both favoring and denying an injunction. In light of the foregoing, the court is constrained to deny the motion for a preliminary injunction.

For the foregoing reasons, both of TOC's motions to dismiss, as well as its motion to strike, are denied. Plaintiffs' motion for a preliminary injunction is denied. Plaintiffs' motion, made orally at the hearing on November 19, to add the Sierra Club as a co-plaintiff is granted.

IT IS SO ORDERED.

Joseph F. Anderson, Jr.
United States District Judge

December 14, 1992
Columbia, South Carolina

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

FRIENDS OF THE EARTH, INC.)
ET AL)
)
PLAINTIFFS,)
)
VERSUS) C/A NO. 3:92-1697-17
)
LAIDLAW ENVIRONMENTAL SERVICES)
(TOC), INC.)
)
DEFENDANT)

BEFORE

THE HON. JOSEPH F. ANDERSON, JR.
U. S. DISTRICT JUDGE

COLUMBIA, S. C.
NOVEMBER 29, 1993

VOLUME V
TRANSCRIPT OF NON-JURY TRIAL

APPEARANCES

FOR THE PLAINTIFFS: BRUCE J. TERRIS, ESQ.
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FOR THE DEFENDANT: MICHAEL S. THWAITES, ESQ.
DONALD A. COCKRILL, ESQ.
KRISTOFER K. STRASSER, ESQ.
P. O. BOX 2757
GREENVILLE, S. C. 29602

AS LATE AS WE CAN CONVENIENT WITH YOUR OWN SCHEDULE, OF COURSE, SO WE DON'T END TOMORROW AND FIND THAT WE GOT ---

THE COURT: WE NEED TO PUT IN A FULL DAY TODAY, YES, SIR. WE WILL BE IN RECESS.

(LUNCHEON RECESS).

THE COURT: ALL RIGHT, I'M READY TO PROCEED. DID YOU HAVE ANY ADDITIONAL QUESTIONS OF THIS LAST WITNESS?

MR. THWAITES: NO, YOUR HONOR.

THE COURT: CALL YOUR NEXT WITNESS, PLEASE.

MR. COCKRILL: THE DEFENDANT WOULD CALL DR. SAM WHITE.

THE CLERK: PLEASE COME FORWARD TO BE SWORN.

SAM WHITE, SWORN

DIRECT EXAMINATION

BY MR. COCKRILL:

Q. DR. WHITE, WHAT IS YOUR WORK ADDRESS?

A. WORK ADDRESS IS WITH RMT IN GREENVILLE, SOUTH CAROLINA, IT'S 100 VRDAE BOULEVARD IN GREENVILLE.

Q. WHAT IS YOUR PRESENT JOB?

A. I'M THE PROGRAM MANAGER FOR WASTEWATER FOR RMT.

Q. AND WHAT IS RMT?

A. RMT IS A FULL SERVICE ENVIRONMENTAL CONSULTING ENGINEERING FIRM.

Q. AND THEY ARE LOCATED WHERE? GREENVILLE?

A. THE SOUTHEAST REGION OFFICE IS IN

[5-99]

GREENVILLE -- AM I NOT

[5-141]

Q. ON AN ONGOING BASIS? ARE THEY IN COMPLIANCE WITH THE PERMIT NOW, AS FAR AS YOU KNOW?

A. I WILL SAY IN SUBSTANTIAL COMPLIANCE.

Q. WHAT DO YOU MEAN --

A. THERE ARE -- I THINK OVER THE PAST YEAR THERE HAVE BEEN TWO OR THREE EXCURSIONS BEYOND THE 1. 3 THAT I'M AWARE OF.

Q. AND THAT'S IN THE PAST YEAR?

A. CORRECT.

Q. HAVE THEY TAKEN SPECIAL STEPS TO STAY IN COMPLIANCE?

A. YES. THEY HAVE. AT BOTH ENDS OF THE PLANT, AS WAS DISCUSSED IN EARLIER TESTIMONY THIS MORNING.

AT THE TAIL END OF THE PLANT THEY HAVE ADDED ON TWO OR THREE LEVELS OF TECHNOLOGY THAT DID NOT EXIST BEFORE. THAT WAS THE POINT OF DISCUSSION OF A NUMBER OF THE PILOT TESTS THAT WERE DONE RECENTLY, AND NOW THE PERMIT TO CONSTRUCT AND ACTUALLY THE INSTALLATION OF FILTERS, CARBON, ION EXCHANGE, ALL THOSE TECHNOLOGIES THAT WERE DISCUSSED. THAT'S ON THE TAIL END OF THE PLANT. THOSE ARE THE STEPS THEY HAVE TAKEN OVER AND ABOVE WHAT IS TYPICALLY DONE BY ANYBODY -- THOSE ARE ALL TERTIARY TREATMENT -- ADVANCED WASTE TREATMENT TECHNOLOGY, TYPICALLY ONLY ONE OF WHICH IS SELECTED AND INSTALLED AT A LOCATION. THAT'S ON THE TAIL END.

[5-141]

ON THE FRONT END OF THE PLANT I UNDERSTAND THAT THEY HAVE RESTRICTED THE LOAD OF MERCURY THAT IS ALLOWED TO BE BLENDED AND INTRODUCED INTO THE INCINERATOR, SEVERELY

[5-142]

RESTRICTED BEYOND WHAT THEY OTHERWISE WOULD BE ALLOWED TO PUT INTO THE INCINERATOR.

Q. DOES LAIDLAW HAVE AN ALLOWABLE LIMIT OF MERCURY THAT THEY CAN FEED INTO THE WASTEWATER OR INCINERATE ON A DAILY BASIS?

A. YES, THERE IS A RCRA LIMITATION THAT I CANNOT CITE THE POUNDS PER DAY ON MERCURY, BUT THERE IS A LIMITATION --

Q. AND RCRA IS R-C-R-A, ALL CAPS, CORRECT?

A. EXACTLY.

Q. WHAT IS THAT? YOU DON'T HAVE TO GIVE US THE FULL TITLE, IT'S FEDERAL LAW, THOUGH, RIGHT?

A. EXACTLY. IT'S THE HAZARDOUS WASTE MANAGEMENT REGULATIONS.

Q. SO, UNDER RCRA THEY HAVE SOME NUMBER OF POUNDS THAT THEY ARE ALLOWED TO INCINERATE ON A DAILY BASIS; IS THAT CORRECT?

A. THAT'S CORRECT.

Q. AND ARE THEY INCINERATING THAT MUCH?

A. NO. THE RECORDS SHOW THAT FOR THE -- FOR THE PAST YEAR, AT LEAST THE PAST YEAR IN QUESTION WHERE I CITED THERE MAY HAVE BEEN TWO TO THREE VIOLATIONS OR EXCEEDANCES OF

[5-142]

THE 1. 3 PARTS PER BILLION LEVEL. IN THAT SAME YEAR. JUST ON A ROUGH AVERAGE, THEY HAVE BEEN INTRODUCING INTO THE INCINERATOR APPROXIMATELY TWO TEN-THOUSANDTHS -- THAT'S TEN-THOUSANDTHS.

Q. . 02 PERCENT?

A. EXACTLY. TWO TEN-THOUSANDTHS OF WHAT THEY ARE ALLOWED TO ENTER INTO THE INCINERATOR BY RCRA.

[5-143]

Q. IS IT YOUR UNDERSTANDING THEY ARE TURNING AWAY SOME BUSINESS IN ORDER TO STAY IN COMPLIANCE?

A. YES, THEY ARE.

MR. COCKRILL: THANK YOU, DR. WHITE.

THE COURT: WHY DON'T WE TAKE A MID AFTERNOON BREAK AT THIS POINT?

LET'S TAKE A 15 MINUTE RECESS.

(SHORT RECESS).

THE COURT: ALL RIGHT, YOU MAY CROSS EXAMINE THE WITNESS.

CROSS EXAMINATION

BY MR. TERRIS:

Q. DR. WHITE, GOOD AFTERNOON.

A. HELLO.

Q. I'M CORRECT, AM I NOT, THAT THE PURPOSE OF THE FISH STUDY WAS TO PERSUADE DHEC TO INCREASE THE MERCURY LIMIT?

A. TO PROVIDE THEM TECHNICAL JUSTIFICATION TO ALLOW THEM TO ESTABLISH A HIGHER MERCURY NPDES LIMIT. YES.

Q. THANK YOU. THE WORK PLAN FOR YOUR FISH TISSUE STUDY, IT PROVIDED THAT YOU

[5-143]

WOULD USE THE HIGHEST TROPHIC LEVEL ORGANISM COMMON TO ALL THREE SITES; ISN'T THAT RIGHT?

A. CORRECT. THE HIGHEST TROPHIC LEVEL COMMON TO ALL THREE AND AVAILABLE IN SUFFICIENT NUMBERS TO DO WHAT WE SAID WE WERE GOING TO DO WITH THE STUDY.

Q. WHAT I GAVE YOU WAS AN ACTUAL QUOTE, THAT IT WAS -- IT'S

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG)

South Carolina Department of Health and Environmental Control,

Plaintiff,

v.

Laidlaw Environmental Services (TOC), Inc.,

Defendant.

COMPLAINT
92-CP-42-1429

INTRODUCTION

1. This action is brought to enforce compliance with the terms of a National Pollutant Discharge Elimination System ("NPDES") permit issues to the Defendant pursuant to the South Carolina Pollution Control Act, S. C. Code Ann. §§ 48-1-10 *et seq.*

JURISDICTION

2. This Court has jurisdiction over this action pursuant to S. C. Code Ann. § 15-7-30.

PARTIES

3. Plaintiff, Department of Health and Environmental Control ("DHEC"), is an agency of the State of South Carolina with responsibility for implementing the South Carolina Pollution Control Act, S. C. Code Ann. §§ 48-1-10 *et seq.* , and the NPDES Permit Regulations , 24 S. C. Code Ann. Regs. 61-9. Plaintiff is empowered to bring this action pursuant to § 48-1-50(4) of the South Carolina Pollution Control Act.

4. Defendant, Laidlaw Environmental Services

(TOC), Inc. ("TOC"), a corporation doing business in the State of South Carolina, operates a hazardous waste incinerator located at 301 Railroad Street, Roebuck, Spartanburg County, South Carolina.

FACTUAL BACKGROUND

5. TOC owns and operates a wastewater treatment system as part of its Roebuck facility.

6. The facility is authorized to discharge treated wastewater into the North Tyger River in accordance with the provisions contained in NPDES permit No. SC0040517 issued by DHEC on December 15, 1986. The NPDES permit was modified on December 14, 1989, and again on July 23, 1990.

7. The NPDES permit was scheduled to expire on December 31, 1991. On June 28, 1991, Defendant applied to renew its permit.

8. By letter dated July 1, 1991, Plaintiff acknowledged receipt of Defendant's application of renewal of its NPDES permit. Plaintiff's letter also states that Defendant's permit SC0040517 will remain fully effective and enforceable pending issuance of the new permit. Defendant therefore continues to operate under the terms of NPDES permit SC0040517 issued December 15, 1986 and modified December 14, 1989 and July 23, 1990.

9. Part I. A and Part III. A. 7 in the NPDES permit establish, in part, effluent parameters and limitations allowable for Defendant's treated wastewater discharge.

10. The NPDES permit issued to Defendant requires monitoring and the submittal of Discharge Monitoring Reports ("DMRs") and Noncompliance Reports to Plaintiff.

11. On September 7, 1988, Consent Order 88-47-W was executed by the Commissioner of DHEC which required Defendant to initiate corrective measures related to its

wastewater treatment system because DMRs submitted by the Defendant revealed that the treated wastewater discharge did not consistently achieve compliance with limitations in the NPDES permit. The Consent Order also assessed a civil penalty of $20,000. 00. This Consent Order administratively expired on March 15, 1991.

12. Despite Defendant's efforts to control discharges. Plaintiff has determined that DMRs submitted by Defendant demonstrate that the discharge of pollutants in excess of applicable effluent limitations has continued since April, 1991.

CAUSE OF ACTION

13. The South Carolina Pollution Control Act prohibits the discharge of pollutants except as in compliance with provisions of a permit.

14. Defendant has failed to consistently comply with the terms of its NPDES permit, thereby violating the permit and the South Carolina Pollution Control Act.

15. Plaintiff is aware that Defendant has made significant efforts to control the variability of certain constituents in its treated wastewater discharge; however, compliance with certain parameters in Defendant's NPDES permit have not been consistently achieved.

CLAIM FOR RELIEF

WHEREFORE, Plaintiff prays for the following relief:

16. That the Court order Defendant to comply with the terms and conditions of its NPDES permit and the South Carolina Pollution Control Act.

17. That the Court issue an injunction ordering

Defendant to install additional pollution control equipment and/or make modifications to its wastewater treatment system in order to meet applicable effluent limitations.

18. That the Court impose civil penalties for the above-stated violations in an amount to be established taking into account the following factors:

a. The seriousness of the violation;
b. The economic benefit (if any) resulting from the violation;
c. The history of such violations;
d. Defendant's good faith efforts to comply with the requirements;
e. The economic impact of the penalty on Defendant; and
f. Such other matters as justice may require.

Dated this 9th day of June, 1992.

Respectfully submitted,

By: _____

William A. Ready
Staff Attorney

Walton J. McLeod, II
General Counsel

South Carolina Department of Health
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[CERTIFICATE OF SERVICE OMITTED IN PRINTING]

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG)

South Carolina Department of Health and Environmental Control,

Plaintiff,

v.

Laidlaw Environmental Services (TOC), Inc.,

Defendant.

CONSENT ORDER AND DECREE

WHEREAS, the Plaintiff, South Carolina Department of Health and Environmental Control ("Department"), previously filed a complaint in this Court against Defendant, Laidlaw Environmental Services (TOC), Inc. ("TOC"), alleging violations of National Pollutant Discharge Elimination System ("NPDES") permit No. SC0040517 and the South Carolina Pollution Control Act;

WHEREAS, Plaintiff and Defendant agree that settlement of these matters is in the best interest of the parties and the public, and that entry of this Consent Order and Decree ("Consent Order") without additional litigation is the most appropriate means of resolving this action;

WHEREAS, Plaintiff and Defendant, by their authorized counsel and without trial or final adjudication of the issues of fact or law with respect to Plaintiff's claims or allegations, consent to the entry of this Consent Order to avoid further litigation and to resolve the controversy between them;

WHEREAS, Plaintiff and Defendant stipulate that this Court has jurisdiction of the parties and the subject matter involved in this action;

WHEREAS, Section 48-1-50 of the South Carolina Pollution Control Act, S. C. Code of Laws, Section 48-1-50, enumerates the powers of Plaintiff and specifies that Plaintiff

has the authority to make, revoke, or modify orders, and administer penalties for violation of the code, any order, permit, regulation, or standard;

WHEREAS, Plaintiff has considered all the allegations raised in the pleading and the actions of Defendant, including Defendant's cooperation with Plaintiff and Defendant's voluntary actions and efforts in the area of environmental compliance, and believes the remedies required by this Consent Order are appropriate and just; and

WHEREAS, Plaintiff recognizes that persistent efforts have been made by Defendant, at considerable expense, to evaluate and control the discharge of pollutants in excess of current effluent limitations. Among the efforts made by Defendant are:

March-June 1989	Made numerous contacts with Department personnel regarding boiler blowdown, wastewater, and flow-through test.
June 1989 - March 1991	Three trial studies to determine the appropriate treatment system. All data, progress reports, engineering assessments, and construction progress reports were submitted to the Department, which concurred with the selection of the treatment technology.
March 1991	Metals removal system upgrade made to the wastewater treatment system at a cost of

	approximately $920,000 which incorporated Best Available Technology for removal of metals.
March 1991	Onsite office was established for full-time Department inspector who reviews all monitoring records.
April 1991	Meeting with Department to discuss metals system removal upgrade and mercury analysis and removal.
May 1991	Submittal of request to add iron sulfate to wastewater treatment system. (Department granted request.)
June 1991	Letter to Department requesting relief from the permitted limit for mercury in accordance with the permit. (The limit for mercury was decreased by the Department in 1987 to its present level.)
June 1991	Submittal of the first semi-annual macroinvertebrate assessment of the North Tyger River for 1991. (Assessment indicates that wastewater discharge from the facility is

	not impacting the receiving stream.)
July 1991	Department internal memorandum agreeing that the final effluent discharge from TOC has little impact on the macroinvertebrate communities of the North Tyger River.
August 1991	Replacement of faulty seals in the absorption filters.
September 1991	Meeting with Department to update efforts made and findings reached regarding mercury levels in effluent.
September 1991	Conceptual proposal submitted for site specific permit effluent limit.
October 1991	Department internal memorandum stating that conceptual proposal for site specific permit effluent limit is generally a reasonable approach.
December 1991	Second semi-annual macroinvertebrate assessment of the North Tyger River for 1991 indicates that the facility's wastewater discharge is not

impacting the receiving stream.

January 1992	Additional telephone conversations with Department concerning abnormal mercury excursions. Department indicated it believed TOC was doing all it could to rectify the abnormal mercury excursions.
February 1992	Final proposal submitted for a site specific permit effluent limit. Comments by Department were addressed.
May 1992	Submittal of work plan describing an investigation of mercury in fish tissue collected from the North and Middle Tyger Rivers. The study was approved by the Department and initiation of the study has begun.

NOW, THEREFORE, pursuant to Rule 41(a)(2) of the South Carolina Rules of Civil Procedure, without trial of any issue of fact or law, and without admission by Defendant of the facts or violations alleged in the complaint, and upon consent of the parties, and upon consideration of the mutual promises contained herein, it is herby ORDERED, ADJUDGED, AND DECREED as follows:

1. Plaintiff's Complaint against Defendant is hereby dismissed.

2. The undersigned representative for each party certifies that he/she is fully authorized by the party or parties whom he/she represents to enter into the terms and conditions of this Consent Order and to legally bind them to it.

3. This Consent Order shall apply to and be binding upon the parties and their employees, members, agents, successors, and assigns.

4. This Consent Order constitutes a full, fair, reasonable, and complete settlement of the allegations contained in the complaint filed in this case, and all other claims covered by this Consent Order, including all claims Plaintiff might have arising out of or in any way connected with alleged violations of NPDES Permit No. SC0040517, and is determined to be in the public interest and an appropriate resolution of the facts which generated Plaintiff's complaint.

5. This Consent Order shall not constitute the admission or evidence of any wrongdoing or misconduct or liability on the part of Defendant. Nothing in this Consent Order shall preclude or impair in any manner any agreements, defenses, or arguments that might be raised by Defendant in any other proceeding.

6. During the time period indicated above, numerous communications, including telephone conferences, written correspondence, and meetings, have occurred between Plaintiff and Defendant pertaining to efforts being made by Defendant regarding operation and/or upgrades to Defendant's wastewater treatment system.

7. Defendant shall complete the fish tissue study for mercury by August 1, 1992.

8. Within 60 days from the fish tissue study for mercury, as described in paragraph number 7, Defendant shall meet with Plaintiff to determine if a different effluent limitation for mercury is justified and, if so, to initiate the proper steps to modify the discharge permit.

9. Defendant shall ensure that the analyses are performed on the same normal work day (Monday through Friday unless a holiday) that a sample is collected unless prior approval is obtained by Defendant from Plaintiff.

10. Defendant shall use every effort, to include but not limited to the adjustment of the mercury-containing waste feed rate, to achieve compliance with the limitation for mercury in its permit and, depending upon any change in the limitation resulting from the fish tissue study, shall submit to the Plaintiff for approval additional plans to meet the limitation for mercury.

11. In the event the Defendant discharges a pollutant in an amount greater than 10 times the permitted limitation, such discharge shall be reported to the Plaintiff within 24 hours thereof.

12. For all permit violations which have occurred up to the date of execution of this Consent Order, Defendant shall pay to Plaintiff within thirty (30) days of receipt of this fully executed Consent Order a civil penalty in the amount of $100,000.

13. Failure by Defendant to comply with the terms and conditions of this Consent Order shall constitute a violation of the Pollution Control Act and shall subject Defendant to additional enforcement action.

14. The sums to be paid under the terms of this Consent Order shall constitute full settlement and shall completely discharge Defendant from any and all liability under the South Carolina Pollution Control Act, S. C. Code Ann. 48-1-10 *et seq.* , or any other provisions of law arising from (a) any and all discharges by Defendant which exceed the limits set in its NPDES permit on or before the date this Consent Order is approved and entered by the Court, (b) the violations alleged in the Complaint, and (c) any and all violations occurring during the period covered by this Consent

Order.

15. This Consent Order shall automatically terminate and expire if and when Defendant achieves compliance with any new permit limit based on paragraph number 8 above or upon submittal of the additional plans, if necessary, and achieve the limitations for mercury referred to in paragraph 10 above.

SO ORDERED by the Court of Common Pleas on this 10th day of June, 1992.

_____
Judge

AGREED:

_____ By: _____
Date William A. Ready
Staff Attorney

Walton J. McLeod, II
General Counsel

South Carolina Department of Health
and Environmental Control
2600 Bull Street
Columbia, South Carolina 29201
(803) 734-4910

_____ By: _____
Date Michael S. Thwaites
Phillip L. Conner
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Friends or the Earth, Inc.; Citizens Local Environmental Action Network, Inc.; and Sierra Club, Plaintiffs, v. Laidlaw Environmental Services (TOC), Inc., Defendant.	C/A No.: 3:92-1697-17 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

I. INTRODUCTION

Laidlaw Environmental Services (TOC), Inc. ("Laidlaw"), owns and operates a hazardous waste incinerator in Roebuck, South Carolina. As part of that facility, Laidlaw maintains a wastewater treatment plant for water used in the incineration process. Laidlaw discharges the treated wastewater into the North Tyger River pursuant to a National Pollutant Discharge Elimination System ("NPDES") permit issued by the South Carolina Department of Health and Environmental Control ("DHEC").

Plaintiffs Friends of the Earth ("FOE") and Citizens Local Environmental Action Network, Inc. ("CLEAN")[1] brought this action on June 12, 1992 against Laidlaw pursuant to the citizen suit provision in section 505 of the Federal Water Pollution Control Act Amendments of 1972, commonly known as the Clean Water Act, 33 U.S.C. § 1365. The Plaintiffs seek to enforce Laidlaw's NPDES permit and request declaratory and injunctive relief, the imposition or civil penalties, and the

[1]At the November 19, 1992 hearing in this action, the court granted the Plaintiffs' oral motion to join the Sierra Club as an additional plaintiff pursuant to Fed. R. Civ. P. 21.

award of costs, including attorneys' fees and expert witness fees.

On July 1, 1992, the Defendant moved to dismiss the Plaintiffs' action, arguing that their citizen suit is barred by section 505(b)(1)(B) of the Act, 33 U.S.C. § 1365 (b)(1)(B), because DHEC had previously brought, and settled, a lawsuit against Laidlaw for the same alleged violations of its permit. The Plaintiffs responded by arguing that DHEC's lawsuit did not preclude the citizen suit because, *inter alia*, DHEC did not "diligently prosecute" its action against Laidlaw. The court heard oral argument on the Defendant's motion to dismiss at the University of South Carolina School of Law on November 19, 1992.

In its order of December 14, 1992, the court denied the Defendant's motion to dismiss, but ruled that the determination of whether DHEC's action constituted diligent prosecution sufficient to bar the Plaintiffs' citizen suit involved disputed factual matters. Accordingly, the court decided to conduct a separate evidentiary hearing on the preliminary issue of whether the Plaintiffs' citizen suit could proceed. The court received a total of seven days of testimony on this matter in October, November, and December of 1993. Thereafter, the court requested the United States Department of Justice to file a brief as *amicus curiae* setting forth the position of the United States Environmental Protection Agency ("EPA") on the issues raised at the hearing. The Department of Justice submitted, on behalf of the United States, two *amicus* briefs that generally supported the Plaintiffs' position.

After receiving all of the testimony, argument, and memoranda from the parties, as well as the submissions from the Department of Justice as *amicus curiae*, and after studying the applicable law, the court makes the following findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52. To the extent that any of the following findings of fact constitute conclusions of law, they are adopted as such, and to the extent

that any conclusions of law constitute findings of fact, they are so adopted.

II. FINDINGS OF FACT

A. Parties

The Plaintiffs, FOE, CLEAN, and the Sierra Club, are non-profit corporations which bring this action on behalf of their members to protect their environmental, health, economic, recreational, and aesthetic interests in the quality of the North Tyger River and waters downstream.

The Defendant, Laidlaw, is a South Carolina corporation which owns and operates a hazardous waste incinerator (hereinafter "the facility") in Roebuck, Spartanburg County, South Carolina. As part of the facility, the Defendant operates a wastewater treatment plant to treat water used in the incineration process before discharging the wastewater into the North Tyger River.

B. Chronology of Laidlaw's Operation of Roebuck Facility

The Defendant purchased the facility from ABCO Industries, Inc. ("ABCO") in January 1986. During most of 1986, after it purchased the facility from ABCO, Laidlaw did not have its own NPDES wastewater discharge permit; rather, Laidlaw operated the facility temporarily under the permit that had been issued to ABCO. On December 15, 1986, pursuant to section 402 of the Clean Water Act, 33 U.S.C. § 1342, DHEC issued to Laidlaw NPDES permit number SC0040517, effective January 1, 1987, for the facility's wastewater treatment plant. The permit authorized the Defendant to discharge limited quantities of pollutants into the North Tyger River in accordance with the conditions set forth in the permit. The permit limited the Defendant's discharge of antimony,

arsenic, cadmium, chromium, copper, lead, mercury, nickel, total organic carbon, and zinc. The permit also limited the flow, temperature, and pH of the effluent from the Defendant's facility. In addition, the permit imposed on the Defendant several monitoring and reporting obligations, such as the requirement to maintain discharge monitoring reports ("DMRs") and laboratory reports.

Several of the effluent limits in Laidlaw's initial permit were more stringent than those under ABCO's permit. The most significant reduction was in the mercury limit, which DHEC proposed to reduce from 20 parts per billion ("ppb") under ABCO's permit to 1.3 ppb. Because Laidlaw's permit contained such a dramatic reduction in the mercury limit, DHEC imposed an interim mercury limit of 10 ppb from January 1, 1987 to December 31, 1987, which decreased to 1.3 ppb on January 1, 1988.[2]

In connection with the interim mercury limit, the permit directed Laidlaw to conduct feasibility studies to determine whether the 1.3 ppb limit could be achieved. In addition, DHEC allowed Laidlaw the option of requesting a higher, site-specific mercury limit upon completion of these feasibility

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[2]On June 28, 1992, the Defendant applied for renewal of its NPDES permit. DHEC issued to the Defendant a draft permit on June 29, 1992 proposing to lower the Defendant's mercury limit to 1.1 ppb. According to the Defendant, DHEC recalculated the 1.1 ppb limit to 1.25 ppb after the Defendant requested a reduction in the wastewater flow rate from 220,000 gallons per day to 207,000 gallons per day. On September 1, 1993, DHEC renewed the Defendant's NPDES permit and imposed an adjusted mercury limitation of 1.25 ppb.

The parties have informed the court that the Defendant appealed the 1.25 ppb mercury limit in the renewed permit and that DHEC agreed to several revised permit conditions. Specifically, DHEC's revisions included changing the Defendant's 1.25 ppb mercury limit from a daily maximum to a monthly average maximum and raising the Defendant's maximum mercury limitation to 10 ppb. The Plaintiffs have informed the court that they have requested an administrative hearing regarding DHEC's modifications to the Defendant's NPDES permit. This order does not address the impact, if any, that the revised mercury limit would have on the merits of the Plaintiffs' lawsuit.

studies.

Faced with a drastic reduction in the mercury limit, Laidlaw contracted with Environmental Technology Engineering, Inc. ("ETE"), an environmental consulting firm, in December 1986 to conduct an engineering feasibility study to determine the best technological approach to achieving the strict 1.3 ppb mercury limit. ETE initially evaluated eight possible technologies and narrowed the focus to two technologies--activated carbon and ion exchange--for bench and pilot scale testing. ETE tested these technologies between June and December 1987 and recommended the installation of a second carbon adsorption unit to be run in series with Laidlaw's existing carbon unit. When the Defendant's permit was issued in December 1986, the facility's wastewater treatment plant consisted of a neutralization system, a carbon adsorption filter, and a cooling system. In early 1988 the Defendant installed the second carbon adsorption unit. Because of ETE's recommendation that the second carbon unit should enable Laidlaw to meet the 1.3 ppb mercury limit, the Defendant chose not to exercise its option of requesting a higher mercury limit at that time.

Despite ETE's testing, the additional carbon unit did not allow the Defendant's facility consistently to achieve the 1.3 ppb mercury limit. The Defendant's continuing problem with mercury excursions came to a head in May 1988 after a fish kill on the North Tyger River downstream of Laidlaw's facility. DHEC investigated the incident and determined that the fish kill was caused by a pH upset at the Defendant's facility. Thereafter, DHEC initiated an administrative enforcement action, which culminated in a consent order with Laidlaw on September 7, 1988. The consent order required the Defendant to investigate treatment technologies that would enable it to comply with the pH limits in its permit. In addition, DHEC imposed on the Defendant a $20,000 penalty and required the Defendant to replace the killed fish.

In response to the September 1988 consent order, Laidlaw contracted with RMT, Inc., another environmental consulting firm, to reevaluate the facility's wastewater treatment system and to make recommendations for correcting the problems Laidlaw was continuing to have with mercury and other metals excursions. During the latter part of 1988, RMT investigated four conceptual approaches to treating the effluent from the Defendant's facility. In December 1988, RMT submitted a preliminary engineering report to DHEC recommending the testing of three metals removal systems, trade named Unipure, Lancy, and Mem Tek, each of which employed a different technology for metals removal. During 1989, Laidlaw and RMT conducted bench and pilot scale tests on these three wastewater treatment systems.

Also during 1989, Laidlaw applied for and received approval from DHEC to replace its two existing cooling towers with a single, more advanced cooling system. The new cooling system was necessary to eliminate occasional temperature excursions that the Defendant experienced during the summer months.

On December 28, 1989, Laidlaw submitted to DHEC the results of RMT's pilot testing. These results showed that, among the three systems tested, the Lancy system was the most likely to achieve the Defendant's NPDES permit limits for all metals, including mercury. As a result, Laidlaw selected the Lancy system and requested approval from DHEC for its installation. DHEC approved the Defendant's request and issued a construction permit on July 10, 1990.

During the latter half of 1990 and the first two months of 1991 the Lancy system was constructed and installed at the Defendant's facility. Between February and July 1991, the Defendant began full scale operation of the Lancy system.

The Lancy system brought the Defendant into compliance with the non-mercury metals limits in the Defendant's permit. However, at least by April 1991, it was

clear that the Lancy system would not enable the Defendant to comply with its mercury limit.

In responding to the continuing problems with mercury, the Defendant worked with DHEC and Lancy to make operational adjustments to the system in an effort to achieve compliance with the mercury limit. When it ultimately became apparent that mercury excursions were continuing to occur, the Defendant put pressure on the manufacturer of the Lancy system to correct the problem. Lancy responded by recommending numerous testing procedures, including the addition of varying amounts of iron sulfate, copper sulfate, and free sulfide. These tests were unsuccessful, however, in reducing the mercury content below the NPDES limit. Lancy thereafter determined that achieving the 1.3 ppb limit was problematic because it appeared that the level of metals being introduced to the wastewater treatment system was simply too low for the system to work effectively on mercury.

Because meeting the strict mercury limit continued to be problematic, on June 26, 1991, the Defendant filed with DHEC a request for a higher, site-specific limit for mercury. During the latter part of 1991, and continuing into the early part of 1992, Laidlaw both pursued its request for a higher mercury limit and continued to perform tests and otherwise investigate ways to achieve the 1.3 ppb limit. To support its request for a higher mercury limit, the Defendant commissioned a study of mercury levels in fish in the North Tyger River. DHEC found the Defendant's study to be inconclusive, however, and informed the Defendant that the study did not meet EPA criteria.

DHEC enforcement officials testified that they began to consider taking additional enforcement action in early 1992, after a series of abnormally high mercury violations at the Defendant's facility in December 1991. However, DHEC did not commence its enforcement action until May 1992.

On April 10, 1992, the Plaintiffs sent a letter to the Defendant, to the EPA, and to DHEC, informing them that the Plaintiffs intended to file a citizen suit against Laidlaw under section 505 of the Clean Water Act after sixty days, or on or after June 10, 1992.

DHEC initiated a formal enforcement action on May 21, 1992 by issuing to the Defendant a Notice of Enforcement Conference. The fact sheet attached to the Notice of Enforcement Conference stated that since April 1991 the Defendant had committed 225 violations of the mercury limit in its permit and two violations of the permit limit for antimony. DHEC was unaware of any violations of the Defendant's permit other than those set forth in the fact sheet. The violations set forth in the fact sheet were based on the monthly DMRs submitted by Laidlaw. DHEC was unaware of any violations of the monitoring or reporting requirements of the Defendant's permit.

On June 5, 1992, DHEC held an enforcement conference with the Defendant. Subsequent meetings and telephone conferences to negotiate a consent agreement occurred later in the day on June 5, 1992, as well as on June 8, 1992. The parties reached a final consent agreement on June 8, 1992. On June 9, 1992, the Defendant filed a judicial complaint in the Court of Common Pleas in Spartanburg County, South Carolina, on behalf of DHEC. On June 10, 1992, a state circuit judge approved the settlement of the DHEC lawsuit.

The Plaintiffs filed the instant lawsuit against Laidlaw on June 12, 1992. The Plaintiffs have compiled lists of the Defendant's alleged permit violations from the Defendant's DMRs and laboratory reports. The Plaintiffs allege that Laidlaw has had a long history of violations of its permit limits for metals and pH. According to the Plaintiffs, since the Defendant obtained its NPDES permit for the Roebuck facility it has committed at least 1,044 discharge violations, some of which allegedly continued until March 1993.

The Plaintiffs' lists of alleged violations show that the Defendant's most frequent violations have been of its limit for mercury. The Defendant's permit requires it to monitor for mercury every day that the incinerator is in operation. The Plaintiffs allege that the Defendant violated its mercury limit on almost a daily basis from early 1991 until June 18, 1992. The Plaintiffs also contend that the Defendant committed at least 31 discharge violations after the Consent Order with DHEC was entered. In addition, the Plaintiffs allege at least 676 violations of the permit's monitoring requirements and 615 violations of the permit's reporting requirements.

After the Consent Order with DHEC was entered, Laidlaw continued to explore additional technologies that might help to remedy the mercury problems. The Defendant experimented with various operational changes to the system and performed various tests utilizing chemicals and technologies both recommended by Laidlaw's consultants and developed internally by Laidlaw personnel. As the mercury problems continued to be investigated, the Defendant had to simply shut down the incinerator altogether for substantial periods of time in July, August, September, and November 1992, in an effort not to violate either its mercury parameter or the judicial consent order with DHEC.

The solution to meeting the 1.3 ppb limit was ultimately achieved by Laidlaw personnel through experimentation utilizing activated carbon, microfiltration, and ion exchange. The Defendant discovered that adding activated carbon filters at the end of the Lancy system effectively reduced the mercury level below 1.3 ppb, so long as the Defendant limited the feed rate of mercury-containing waste into the incinerator. The only problem encountered with this configuration occurred when the carbon adsorption filters were backwashed, as this procedure tended to release extremely fine particulates into the wastewater stream. Since any mercury-containing particulate would likely violate the 1.3 ppb limit, Laidlaw added both a

microfilter and an ion resin exchange unit after the carbon filters to remedy this problem. The addition of the new equipment, combined with the Lancy system and the other components of the wastewater treatment system, has enabled the Defendant consistently to achieve full compliance with all of the parameters contained in its NPDES permit.

Following an extended period of demonstrated full compliance, DHEC agreed to allow the judicial consent order to expire. DHEC so notified the state court in a letter dated August 6, 1993 from DHEC attorney William Ready.

C. DHEC's Judicial Enforcement Action

1. Decision to file judicial action

DHEC's original intent in prosecuting the Defendant for NPDES violations was to bring an administrative enforcement action against the Defendant. In fact, DHEC's usual approach in bringing a formal enforcement action is to issue a notice of enforcement conference and negotiate an administrative consent order. After receiving the Plaintiffs' sixty-day notice letter, however, Ralph Mellom, the Defendant's outside counsel, called Russell Sherer, Chief of DHEC's Bureau of Water Pollution Control, and inquired whether DHEC would consider filing an action in court against the Defendant. Sherer informed Mellom that DHEC had no interest in filing a judicial action instead of proceeding with an administrative action. Sherer stated, however, that DHEC would agree to file an action in court if the Defendant would expend any additional resources necessary to file a judicial action.

On June 5, 1992, following the DHEC enforcement conference, counsel for the Defendant telephoned DHEC and requested that the agency file a judicial action instead of proceeding with an administrative action. The Defendant's

reason for requesting that DHEC file a judicial action was to bar the Plaintiffs' proposed citizen suit in federal court. DHEC does not normally file judicial actions to enforce NPDES permits. Indeed, Sherer testified that DHEC had filed judicial actions in only two cases prior to filing the judicial action against the Defendant and that, in each of the previous cases, the defendant had requested that a judicial action be filed. Earl Hunter, the Director of the Division of Water Quality Assessment and Enforcement in DHEC's Bureau of Water Pollution Control, testified that if the Plaintiffs had not sent a sixty-day notice letter, DHEC probably would not have filed a judicial action. Since DHEC must go to court to enforce either an administrative order or a judicial consent decree, DHEC gains no advantage by filing a judicial action instead of proceeding with an administrative action. DHEC filed a judicial action against the Defendant solely because counsel for the Defendant requested that DHEC file a judicial action instead of an administrative action.

2. Procedural aspects of DHEC's judicial action

At the direction of Mellom, Phillip Connor, an associate with Mellom's law firm, drafted the initial version of the DHEC Complaint and of the Consent Order. On June 9, 1992, the sixtieth day after the Plaintiffs sent their sixty-day notice letter, Connor obtained the signatures from DHEC on the Complaint and Consent Order and signed the Consent Order for the Defendant. He then drove the Complaint and the Consent Order to the courthouse in Spartanburg, where he filed the Complaint and paid the filing fee for DHEC. He left the Consent Order in the judge's chambers, and the judge signed it the next day. The Consent Order was entered at 9:34 a.m. on June 10, 1992.

DHEC and the Defendant reached a settlement agreement pertaining to the DHEC lawsuit on Monday, June 8,

1992, just one business day after the initial enforcement conference. The time period from the enforcement conference to the final settlement agreement was, by DHEC's standards, "exceedingly fast." The usual time period from the date of the enforcement conference to the date of a consent order is thirty to forty-five days. Robert Knauss, the DHEC enforcement officer with responsibility for the Defendant's facility, testified that none of the cases in which he has been involved has moved as quickly to final settlement as DHEC's action against the Defendant. Similarly, William Krecker, the Section Manager of the Enforcement Division of DHEC's Bureau of Water Pollution Control, testified that, of the 100 to 200 enforcement cases he had been involved in, none has been resolved as quickly as DHEC's action against the Defendant. Hunter testified that the reason for the swiftness of the DHEC proceeding was the Defendant's request that DHEC file a judicial action and the deadline imposed by the Plaintiffs' sixty-day notice letter. Sherer testified in 1990, in another case, that citizen suits help bring about compliance and that DHEC's policy was not to file an action in court when requested to do so by a defendant in order to bar a citizen suit. DHEC's action in this case violates this policy.

3. Substantive aspects of Consent Order

DHEC initially sought a penalty of $120,000 from the Defendant. Knauss determined that DHEC would seek a penalty of $120,000, because that amount was consistent with past penalties obtained by DHEC. He testified that he determined in his head the amount of the penalty to seek from the Defendant and that he made no written record of how he arrived at the figure of $120,000. Both Hunter and Krecker approved the $120,000 penalty amount; however, neither of them personally involved himself in the computation of the penalty amount, each deferring to Knauss regarding the details

of the penalty proposal. Hunter and Krecker also approved the $100,000 penalty ultimately included in the Consent Order.

DHEC's uniform enforcement policy, which was approved by the DHEC board in December 1991, sets forth several factors that may be considered in the assessment of civil penalties, including "[e]conomic benefit as a result of noncompliance." DHEC, Uniform Enforcement Policy, at 3, ¶ 3(d) (Dec. 12, 1991) (Pl. Ex. 10). In addition, DHEC's Bureau of Water Pollution Control has a guidance document that recommends a penalty of $1,000 for each discharge violation. DHEC Bureau of Water Pollution Control, Penalty Assessment Guidance, at 4 (Pl. Ex. 92). This amount may be adjusted upward or downward depending on various mitigating factors, such as mechanical problems, vendor problems, or inability to pay. *Id.* at 4-5. No evidence has been presented that any of these mitigating factors applied in this case. If a penalty of $1,000 per violation had been imposed in this case, the penalty based on the number of violations listed in the fact sheet accompanying DHEC's Notice of Enforcement Conference would have been $227,000.

In considering the seriousness of a permittee's violations, DHEC uses the standard of whether the violations were more than 1.4 times the permit limit. Knauss was aware that most of the Defendant's mercury violations were greater than 1.4 times its permit limit for mercury. The DHEC penalty guidance and policy documents were available to enforcement staff at the time of the DHEC lawsuit.

DHEC made no attempt to calculate the Defendant's economic benefit from noncompliance. Krecker testified that he had no reason to believe that the Defendant had enjoyed any economic benefit and that economic benefit was not a factor in Knauss's consideration. Also, Hunter testified that Knauss considered, but did not calculate, economic benefit. However, no DHEC enforcement personnel obtained the information necessary to make an economic benefit calculation. DHEC did

not determine the capital costs or the operation and maintenance costs of the wastewater treatment equipment installed by the Defendant. According to Krecker, DHEC does not normally make an economic benefit calculation in proceedings to enforce NPDES permits.

Hunter testified that DHEC considers economic benefit in conjunction with good-faith attempts at compliance and that "economic benefit is usually derived from someone that just ignores environmental laws and doesn't want to place equipment in place." In this case, although the Defendant had been in violation of its permit for five years by the time DHEC brought it enforcement action in 1992, Krecker testified that he did not consider the Defendant to have obtained any significant economic benefit because the Defendant installed pollution control equipment with the intent of being in compliance. Since DHEC believed that the Defendant was attempting in good faith to comply with its permit, DHEC did not deem economic benefit to be an important consideration in calculating a penalty against the Defendant.

On June 9, 1992, DHEC and the Defendant entered into a Consent Order in which the Defendant agreed to pay a penalty of $100,000. The Consent Order contains no injunction requiring the Defendant to comply with its permit, but requires only that the Defendant make "every effort" to comply. Consent Order and Decree, at 5, ¶ 10 (June 9, 1992) (Def. Ex. 167). Also, the Consent Order provides that "[t]he sums to be paid under the terms or this Consent Order shall constitute full settlement and shall completely discharge Defendant from any and all liability . . . arising from . . . (c) any and all violations occurring during the period covered by this Consent Order." *Id.* at 6, ¶ 14. The Consent Order further provides that it "shall automatically terminate and expire if and when Defendant achieves compliance with any new permit limit based on number 8 above or upon submittal of the additional plans, if necessary, and achieve[s] the limits for mercury referred to in

paragraph 10 above." *Id.* at 6, ¶ 15.

Knauss testified that the Consent Order covered violations that occurred after the date it was entered. Krecker testified that DHEC's normal practice is that violations which occur after the date of a consent order are subject to additional enforcement action. He further testified that he is aware of only one case other than DHEC's case against the Defendant, in which DHEC's settlement covered future violations. In that case, however, the consent order provided for stipulated penalties for future violations. William Ready, DHEC's attorney who worked on this case, testified that it is not DHEC's practice to settle future violations "except on the basis of stipulated penalties." He also testified that DHEC attempted to include stipulated penalties in the Consent Order for permit violations that occurred after the Consent Order was entered, but did not insist them.

With the exception of Knauss, DHEC personnel testified that they did not interpret the Consent Order to cover permit violations that occurred after the date of the consent order. Ready testified that he believed that DHEC could seek penalties for violations occurring after the date of the Consent Order based on paragraph 10 of the Consent Order, which requires that the Defendant make "every effort" to comply with its mercury limit. However, Ready admitted that, if paragraphs 14 and 15 of the Consent Order were interpreted to settle violations occurring after the date of its entry but prior to its expiration, the Defendant would have obtained a benefit that is not extended to other dischargers in South Carolina.

The Consent Order also required the Defendant to complete a fish tissue study. However, before the Consent Order was entered, the Defendant was already planning to conduct the fish tissue study to support its request for a higher mercury limit. DHEC had no interest in having the Defendant perform the fish tissue study.

All of the foregoing factors provide some evidence that DHEC did not diligently prosecute its action against Laidlaw.

D. Economic Benefit of Noncompliance

The Defendant, as a holder of an NPDES discharge permit, should not profit from noncompliance with that permit. If DHEC assessed a penalty that was below the Defendant's economic benefit of noncompliance, DHEC would not have penalized the Defendant at all; instead, the Defendant would have been rewarded for noncompliance with its permit.

Economic benefit is the after-tax present value of avoided or delayed expenditures on necessary pollution control measures. Economic benefit represents the opportunity a polluter had to earn a return on funds that should have been spent to purchase, operate, and maintain appropriate pollution control devices. To determine a company's economic benefit from noncompliance with its permit, one must compare the company's cash flows associated with the delayed permit compliance measures to what those cash flows would have been if the company had obtained the necessary pollution control equipment on time.

EPA describes the nature of the economic benefit enjoyed by a firm that delays compliance with pollution control laws as follows:

> An organization's decision to comply with environmental regulations usually implies a commitment of financial resources; both initially, in the form of a capital investment or one-time expenditure, and over time, in the form of annual, continuing expenses. These expenditures might result in better protection of public health or environmental quality; however, they are unlikely to yield any direct economic benefit (i.e., net gain) to the organization. If

these financial resources were not used for compliance, they presumably would be invested in projects with an expected direct economic benefit to the organization. This concept of alternative investment; that is, the amount the violator would normally expect to make by not investing in pollution control, is the basis for calculating the economic benefit of noncompliance.

As part of the Civil Penalty Policy, EPA uses the Agency's penalty authority to remove or neutralize the economic incentive to violate environmental regulations. In the absence of enforcement and appropriate penalties, it is usually in the organization's best economic interest to delay the commitment of funds for compliance with environmental regulations and to avoid certain other associated costs, such as operating and maintenance expenses.

EPA, *BEN User's Manual* I-6 (July 1990) (Pl. Ex. 91).

Economic experts for both parties in this action testified that whether a permittee proceeded in good faith is irrelevant to economic benefit analysis. According to penalty guidelines promulgated by both the EPA and DHEC, good faith is a separate penalty factor to be considered when one determines what the appropriate civil penalty should be.

Present-value analysis of economic benefit allows one to express all cash flows as of a given date by accounting for the time value of money--i.e., the fact that a dollar today is worth more than a dollar tomorrow. To determine by how much the value of a dollar of one year exceeds the value of a dollar of another year, one must use a discount rate to calculate the present value of money from the various time periods. The discount rate, or "opportunity cost," represents the return the Defendant had the opportunity to obtain by investing the funds

it delayed or avoided spending on pollution control measures. This rate can be used to move dollars through time and determine the Defendant's economic benefit as of a given date.

The court adopts the capital-asset pricing model as the appropriate method for determining the Defendant's benefit of noncompliance. Under the capital-asset pricing model, the discount rate is computed by using a risk-free component, which is based on short-term United States Treasury Bills, and a near-constant risk premium. Using the capital-asset pricing model, Dr. Michael Kavanaugh, the Plaintiffs' economic expert, determined that the appropriate discount rate for this case 15.25%.[3]

The court finds that the economic benefit the Defendant enjoyed by its failure to make timely expenditures for pollution control equipment is substantially in excess of the $100,000 penalty amount as of July 1, 1992, the approximate date of the Defendant's penalty payment to DHEC. Although the court

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[3]Dr. Kavanaugh also calculated the Defendant's economic benefit using two alternative discount rates. First, Dr. Kavanaugh performed the calculation using 18.1% as the discount rate. This was the rate that EPA used at the time of DHEC's lawsuit against Laidlaw in June 1992. Naturally, if the 18.1% discount rate were used for the economic benefit calculation, the Defendant's economic benefit as of the July 1992 penalty payment date would be significantly larger than that calculated using the 15.25% rate.

Second, Dr. Kavanaugh performed the economic benefit calculation using 11.9% as the discount rate. This is the rate that the EPA currently recommends. The 11.9% discount rate is based on a national average for a company's weighted average cost of capital, or WACC. WACC is a method of determining the cost of capital to a company by combining the debt cost of capital and equity cost of capital and weighing those costs based on the proportion of debt and equity in a company's financial structure. WACC is therefore not based on the return an investor could have earned on funds not spent on pollution control, but is a based on the cost of obtaining the money. Since the point of removing economic benefit is to remove the earnings that could be obtained by the discharger by not investing in the actions needed for permit compliance, an equity rate, such as the 15.25% rate used by Dr. Kavanaugh, is preferable to a WACC rate.

accepts Dr. Kavanaugh's methodology or using the capital-asset pricing model to determine a violator's economic benefit of noncompliance, the court declines, at this time, to make a specific finding on the precise amount of the Defendant's economic benefit.

The court's preliminary determination that the penalty imposed by DHEC in the June 9, 1992 Consent Order failed to recover the Defendant's economic benefit of noncompliance is based on the following delayed or avoided expenditures.

1. Neutralization and pH control equipment

The neutralization and pH control equipment that the Defendant had in 1987 was inadequate, according to both Dr. Bruce A. Bell, the Plaintiffs' wastewater treatment expert, and Dr. Thomas Keinath, the Defendant's wastewater treatment expert. By late 1988, the Defendant had replaced its neutralization system with adequate neutralization tanks, a PH control system and freeze protection.[4] The neutralization and pH control system that the Defendant installed was necessary for it to comply with both the metals and pH limits in its permit that became effective on January 1, 1987. This system is necessary for compliance with the metals limits because the removal of metals is dependent on adequately controlling the pH levels in the wastewater. As Dr. Bell testified, the technology for neutralization and pH control has been available at least since the 1960s. Therefore, the court finds that the changes the Defendant made to its neutralization system in 1988 should have been made in time to comply with its metals and pH permit limits that went into effect on January 1, 1987.

[4]The pH system consists of equipment that automatically controls the dose of caustic soda to regulate the pH level in the Defendant's wastewater.

2. Lancy system

Dr. Keinath testified that the dual carbon filter system that the Defendant had in place prior to 1991 did not enable the Defendant to comply with the metals limits in its permit. Dr. Keinath further testified that some metals which are regulated in the Defendant's permit, such as arsenic and antimony, are not easily removed with carbon treatment.

As noted earlier, the Defendant decided in late 1989 or early 1990 to install the Lancy system. The Defendant began operating the Lancy system in March 1991.

The Lancy system consists of equalization, neutralization, sulfide addition, a retention tank, an adsorption filter, and final PH control. According to both Dr. Keinath and Dr. Bell, the Lancy system consists entirely of technology that was available prior to 1987. Dr. Bell testified that the Lancy system has been commercially available since at least 1984. Dr. Keinath testified that, according to the 1985 text, *Industrial Wastewater Treatment Technology* by Dr. James Patterson, the technologies available for treatment of mercury in 1985 were carbon adsorption and ion exchange. However, Dr. Patterson's chapter on mercury removal lists several technologies other than carbon adsorption and ion exchange that were available for mercury removal in 1985. The first technology that Dr. Patterson notes as being available for mercury removal is sulfide addition, which, he writes, can be combined with filtration. Sulfide addition and filtration are the basic technologies underlying the Lancy system. In addition, Dr. Keinath testified that he believed that the Lancy system was unproven technology for mercury removal in 1987. In fact, as both Dr. Keinath and Dr. Bell testified, the Lancy system was unable by itself to remove enough mercury to allow the Defendant to meet the 1.3 ppb mercury limit. However, Dr. Keinath also testified that the Lancy system "could well have been utilized" in 1987 for treatment of metals other than

mercury. Dr. Keinath further testified that the Lancy system had in fact been installed by other dischargers before the Defendant installed the Lancy system.

The court recognizes that the Lancy system "was not available for off-the-shelf purchase in 1986, nor is it currently available for off-the-shelf purchase; rather, the Lancy system consists of technology which must be engineered and manufactured specifically for the purchaser. Nevertheless, according to both Dr. Keinath and Dr. Bell, the Lancy system or its functional equivalent was necessary for the Defendant to comply with the non-mercury metals limits in its permit that went into effect on January 1, 1987. The Lancy system or its functional equivalent also would have enabled the Defendant to comply with the 10 ppb mercury limit that was in effect from January 1, 1987 to December 31, 1987. Therefore, the court finds that the Defendant should have installed the Lancy system or its equivalent by January 1, 1987.

3. Additional mercury-removal equipment

As noted previously, the Lancy system brought the Defendant into compliance with the non-mercury metals limits in its permit, but was unable to achieve the 1.3 ppb mercury limit. In 1992 and 1993, the Defendant installed additional equipment, including carbon adsorption equipment, prefilters, ion exchange equipment, and microfiltration, to remove mercury from its wastewater. In July 1992, the Defendant installed new carbon adsorption equipment. Also, in January 1993, the Defendant installed prefilters, which [illegible] necessary to protect the carbon adsorption equipment. Finally, in April 1993, the Defendant installed ion exchange equipment, as well as microfiltration equipment to remove small particulate mercury formed during the sulfide precipitation process in the Lancy system.

Dr. Keinath testified that he believes that the Defendant

could comply with its permit with only the Lancy system and microfiltration and that the carbon adsorption filters and ion exchange equipment that the Defendant installed were "redundancies." However, Dr. Keinath also testified that both carbon adsorption and ion exchange equipment remove some mercury, that the Defendant's mercury violations continued until after this equipment was in place, and that he was uncertain whether the Defendant could actually comply with its permit without the carbon adsorption and ion exchange equipment.

When the Defendant applied for a permit to construct activated carbon equipment, it stated that such equipment would "further reduce mercury concentrations to below 1.3 ppb in the wastewater discharge." The Defendant's activated carbon equipment in fact worked well to remove mercury from the Defendant's wastewater. Furthermore, when the Defendant applied for a permit to construct ion exchange equipment, it stated that, in conjunction with microfiltration, such equipment "will ensure compliance" with the Defendant's mercury limit. The Defendant's ion exchange equipment also worked well to remove mercury from the Defendant's wastewater. The carbon adsorption filters and ion exchange equipment are designed to remove soluble mercury from the Defendant's wastewater. A test conducted by the Defendant on actual effluent from the Lancy system showed that soluble mercury in concentrations greater than the Defendant's permit limit for mercury sometimes passes through both the Lancy system and the microfiltration equipment. The carbon adsorption and ion exchange equipment are therefore necessary to enable the Defendant to comply with its permit limit for mercury.

All of the mercury removal equipment that the Defendant installed in 1992 and 1993 was necessary to ensure the Defendant's compliance with the 1.3 ppb mercury limit. All of this mercury removal technology was commercially available before the Defendant purchased the facility in 1986.

Therefore, the court finds that the Defendant should have installed the additional mercury removal equipment by January 1, 1988, in order to satisfy the mercury limit in its permit.

In summary, to comply with its permit the Defendant should have installed by January 1, 1987 all of the equipment that is currently in place, or its functional equivalent, with the exception of the equipment that was designed specifically for mercury removal. The Defendant should have installed the remaining mercury removal equipment, or its functional equivalent, by January 1, 1988.

The Defendant realized a significant economic benefit by taking seven years to achieve compliance with its NPDES permit limits. Although Dr. Keinath testified that each of the individual wastewater treatment measures undertaken by the Defendant was logical, the Defendant profited by operating its facility for seven years despite continuing permit violations. In other words, the Defendant is better off now, even after paying the $100,000 penalty, than it would have been had it made the expenditures necessary to comply with its permit in a timely fashion or had it simply shut down the facility until compliance were possible.

III. CONCLUSIONS OF LAW

Congress enacted the Clean Water Act ("CWA" or "the Act") in 1972 "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251 (a). To achieve the stated goals of the Act, section 301(a) makes unlawful the discharge of any pollutant into any navigable waters, except as specifically authorized by certain enumerated sections of the Act. 33 U.S.C. § 1311 (a).

One of these exceptions is section 402, 33 U.S.C. § 1342, which establishes the National Pollutant Discharge Elimination System ("NPDES"). Pursuant to section 402(a), or

pursuant to a state program authorized under section 402(b), the appropriate regulatory authority may issue permits that allow the holder to discharge pollutants in accordance with the conditions and limitations set forth in the permit.[5]

The holder of an NPDES permit who fails to comply with the conditions of its permit may be subject to administrative, civil, or criminal sanctions. 33 U.S.C. § 1319. Permits issued under a state NPDES program are subject to both federal and state enforcement actions. *See id.*; 33 U.S.C. § 1342(b)(7). In addition, section 505 of the CWA authorizes private citizens, under certain circumstances, to bring civil actions to enforce any effluent standard or limitation under the Act, including NPDES permits. 33 U.S.C. § 1365(a)(1).

Section 505(b)(1) provides two significant limitations on a citizen's right to bring a citizen enforcement suit under the CWA.[6] First, under section 505(b)(1)(A), the citizen must provide notice of the alleged violation to the Administrator of

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[5]Section 402(a) grants to the Administrator of the EPA the authority to issue permits for the discharge of pollutants in accordance with the conditions, as set forth in each permit, that the
Administrator determines are necessary to carry out the provisions of the CWA. 33 U.S.C. § 1342(a). Section 402(b) authorizes each state to establish and administer its own NPDES program, subject to the approval and continued monitoring of the Administrator, for navigable waters within the state's jurisdiction. 33 U.S.C. § 1342(b). After a state's NPDES program receives approval under section 402(b), the Administrator suspends the issuance of federal NPDES permits as to the navigable waters subject to the state program, unless the Administrator determines that the state program fails to conform to the guidelines established pursuant to the Act. 33 U.S.C. § 342(c)(1).

South Carolina has established its own NPDES program pursuant to section 402(b). On June 10, 1975, the Administrator of the EPA delegated to DHEC the responsibility for administering the NPDES program in South Carolina. *See* 57 Fed. Reg. 43,734 (Sept. 22, 1992).

[6]In addition, as provided by section 505(a), 33 U.S.C. § 1365(a), citizen suits may also be limited by section 309(g)(6), 33 U.S.C. § 1319(g)(6). However, the Defendant has not asserted that any of the provisions or section 309(g)(6) apply to this case.

the EPA, to the state enforcement agency of the state in which the alleged violation occurs, and to the alleged violator at least sixty days before the citizen may file a citizen suit. 33 U.S.C. § 1365(b)(1)(A). Second, section 505(b)(1)(B) provides that no citizen suit may be commenced "if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with [the same NPDES permit]." 33 U.S.C. § 1365(b)(1)(B).

In the matter currently before the court, the Defendant contends that section 505(b)(1)(B) precludes the Plaintiffs' lawsuit because, it argues, DHEC "diligently prosecut[ed]" an enforcement action against Laidlaw in South Carolina state court on June 9, 1992, which action was settled by judicial consent order on June 10, 1992.

The Plaintiffs raise several arguments in opposition to the Defendant's contention that their citizen suit is barred under section 505(b)(1)(B) by DHEC's lawsuit against the Defendant. The Plaintiffs initially argue that section 505(b)(1)(B) bars the commencement of a citizen suit only while a state or federal enforcement action is pending, but not after that action has been concluded. In other words, the Plaintiffs urge the court to interpret section 505(b)(1)(B) only to prohibit citizen suits and federal or state enforcement suits from proceeding simultaneously. The Plaintiffs assert that section 505(b)(1)(B) does not bar their action because DHEC's action against Laidlaw in June 1992 was settled before the Plaintiffs filed their suit. The Plaintiffs base their argument on a plain reading of section 505(b)(1)(B), which provides that no citizen suit may be commenced if the enforcement agency "has commenced and *is diligently prosecuting*" a judicial action against the alleged violator. 33 U.S.C. § 1365(b)(1)(B) (emphasis added).

Section 505(b)(1)(B) obviously contemplates a situation in which a citizen proposes to file a private enforcement suit contemporaneously with an ongoing governmental enforcement

suit. Indeed, as one district court recognized, "the purpose underlying the 'diligent prosecution' provision [is] that a defendant not be subjected simultaneously to multiple suits, and potentially to conflicting court orders, to enforce the same statutory standard." *Connecticut Fund for the Environment v. Contract Plating Co.*, 631 F. Supp. 1291, 1293 (D. Conn. 1986). Moreover, the provision in section 505(b)(1)(B) that allows any citizen to intervene as of right in any enforcement action brought in federal court clearly envisions the governmental action pending at the time of the attempted citizen suit. However, it is doubtful that Congress intended the preclusive effect of section 505(b)(1)(B) to expire once the government has concluded its diligent prosecution of a particular violator.

As the Defendant observed in response to the Plaintiffs' argument, reading section 505(b)(1)(B) only in the present tense would allow citizens to bring a private enforcement action against any alleged violator, as long as the citizen waited until the conclusion of the governmental action before bringing the citizen suit.[7] Such a result would be contrary to the United

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[7]The court has contemplated that perhaps the concern about potentially duplicative citizen suits could be addressed by the common-law principle of *res judicata*. For example, if a state enforcement agency is deemed to represent all of the state's citizens as *parens patriae*, then an judicial enforcement actions it resolves, either through settlement or judgment, might be binding on the citizens of the state through traditional principles of claim preclusion. *See, e.g., United States EPA v. City of Green Forest, Ark.*, 921 F.2d 1394, 1404 (8th Cir. 1990) (holding that "'once a state represents all of its citizens in a *parens patriae* suit, a consent decree or final judgment entered in such a suit is conclusive upon those citizens and is binding upon their rights'")(quoting *United States v. Olin Corp.*, 606 F. Supp. 1301, 1304 (N.D. Ala. 1985)), *cert denied*, 502 U.S. 956 (1991). Because this issue was not examined at the hearing or in the memoranda of the parties, the court invited both parties to submit supplemental briefs on this issue.

In response, the Plaintiffs assert that the CWA preempts common-law principles of *res judicata* because section 505(a) specifically provides that citizen suits may be brought "[e]xcept as provided in subsection (b) of this section and section 309(g)(6)." 33 U.S.C. § 1365(a). The Plaintiffs argue that because Congress

States Supreme Court's declaration in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49 (1987), that "citizen suits are proper only 'if the Federal, State, and local agencies fail to exercise their enforcement responsibility.'" *Id.* at 60 (quoting S. Rep. No. 414, 92d Cong., 1st Sess. 64 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3730). Thus, although the "diligent prosecution" condition in section 505(b)(1)(B) is phrased in the present tense, the court has determined that Congress intended to prohibit citizen suits where the governmental enforcement agency is diligently prosecuting or has diligently prosecuted a judicial action to enforce the same alleged violations of a particular permit, standard, or limitation.

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explicitly stated that citizen suits can be brought in all other situations, no other limitations, including *res judicata*, apply to citizen suits.

Furthermore, the Plaintiffs argue that a state enforcement action would not preclude, under *res judicata*, a subsequent citizen suit because the two actions would not involve identical parties or their privies. Identity of parties is generally one of the required elements of *res judicata*. *See Nash County Bd. of Educ. v. Biltmore Co.*, 640 F.2d 484, 486 (4th Cir.), *cert. denied*, 454 U.S. 878 (1991). The Plaintiffs recognize that, in a *parens patriae* action, a state represents all of its citizens so that a state action can bar a subsequent, identical action brought by a citizen of the state. *See New Jersey v. New York*, 345 U.S. 369, 372-73 (1953). However, the Plaintiffs argue that in granting citizens the rights to enforce the CWA, Congress recognized that governmental enforcement agencies may not adequately represent the interests of their citizens. Therefore, argue the Plaintiffs, Congress did not intend for citizen suits under the CWA to be restricted by the *parens patriae* doctrine.

The Defendant also argues against the application of *res judicata* in a situation such as that presently at bar. The Defendant primarily asserts that *res judicata* would not apply because there would be no identity of parties between a state enforcement suit and a subsequent citizen suit.

This court need not resolve whether the doctrine of *res judicata* would apply to bar a CWA citizen suit after a governmental enforcement action has been concluded. Generally, *res judicata* is an affirmative defense, which must be specifically pleaded or else it is deemed to be waived. Fed. R. Civ. P. 8(c); *see Sanchez v. City of Santa Ana*, 915 F.2d 424, 431 (9th Cir. 1990), *cert. denied*, 502 U.S. 815 (1991). Because the Defendant has not raised *res judicata* as a defense in this action, this issue is not before the court.

Therefore, the critical issue presently before the court is whether DHEC's June 9, 1992 lawsuit against Laidlaw constitutes diligent prosecution sufficient under section 505(b)(1)(B) to bar the Plaintiffs' citizen suit. This inquiry is guided by several principles that have been developed in the caselaw interpreting the citizen-suit provisions of the CWA.[8]

First, the citizen-plaintiffs bear the burden of proving that the state agency's prosecution was not diligent. This burden is a heavy one because diligence on the part of the enforcement agency is presumed. *See Connecticut Fund for the Environment v. Contract Plating Co.*, 631 F. Supp. at 1293. As several courts have recognized, "the state [enforcement] agency must be given great deference to proceed in a manner it considers in the best interests of all parties involved." *Arkansas Wildlife Fed'n v. ICI Americas Inc.*, 842 F. Supp. 1140, 1147 (E.D. Ark. 1993), *aff'd* 29 F.3d 376 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1094 (1995).

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[8]The issue of diligent prosecution under section 505(b)(1)(B) of the CWA is a federal standard, not a state-law standard as the Defendant asserts. When there is a question concerning what law governs a claim, "it is the *source* of the right sued upon . . . which determines the governing law." *Maternally Yours, Inc. v. Your Maternity Shop, Inc.*, 234 F.2d 538, 540 n.1 (2d Cir. 1956); *see also* 19 Charles A. Wright et al., *Federal Practice & Procedure* § 4515 (1982). When an issue arises under a comprehensive federal statute such as the CWA, that issue should be decided according to federal law. *See PIRG v. Top Notch Metal Finishing Co.*, 29 Env't Rep. Cas. (BNA) 1022, 1028 (D.N.J. 1988) (holding in Clean Water Act case that federal law should be used to decide issue of piercing of corporate veil).

The Defendant's reliance on *United States v. T & S Brass & Bronze Works, Inc.*, 28 Env't Rep. Cas. (BNA) 1649 (4th Cir. 1988), to argue that the court should not impose on a state program a federal standard of diligent prosecution is misplaced. The court in the *T & S Brass* case merely held that state regulations, not federal regulations, govern the closure and post-closure activities of hazardous waste facilities where the federal government has given the state the authority to operate its own regulatory scheme for hazardous wastes in lieu of the federal program. *Id.* at 1650-51. The *T & S Brass* court did not address the standards governing federal enforcement of those regulations.

Deference to governmental enforcement agencies is appropriate because the CWA delegates the primary enforcement responsibility to designated state and federal agencies. For example, the requirement in section 505(b)(1)(A) that a citizen must file a notice letter sixty days before bringing a private enforcement suit clearly was designed to give the governmental agencies the "first shot" at enforcement. As the Supreme Court stated in *Gwaltney*, "the citizen suit is meant to supplement rather than to supplant governmental action." 484 U.S. at 60. Appropriate limitations on citizen suits generally "allow for smoother operation of ordinary enforcement mechanisms" and encourage out-of-court settlements between agencies and polluters. *Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co.*, 777 F. Supp. 173, 179, 186 (D. Conn. 1991), *aff'd in part, rev'd in part*, 989 F.2d 1305 (2d Cit. 1993); *cf. Supporters To Oppose Pollution, Inc. v. Heritage Group*, 973 F.2d 1320, 1324 (7th Cir. 1992) (in action under the Resource Conservation and Recovery Act (RCRA), stating: "An Administrator unable to make concessions is unable to obtain them. A private plaintiff waiting in the wings then is the captain of the litigation.... To say . . . that the EPA is not 'diligently prosecuting' the action if it does not sue the person, or use the theories, the plaintiff prefers would strip EPA of the control the statute provides.").

On the other hand, Congress certainly intended to provide private citizens with significant opportunities to participate in the enforcement of the CWA. *See* S. Rep. No. 414, *supra*, at 72, *reprinted in* 1972 U.S.C.C.A.N. at 3738 ("An essential element in any control program involving the nation's waters is public participation. The public must have a genuine opportunity to speak on the issue of protection of its waters. . . . The scrutiny of the public . . . is extremely important in insuring expeditious implementation of the authority and a high level of performance by all levels or government and discharge sources."). As the United States Court of Appeals for the

Second Circuit stated, "'Congress made clear that citizen groups are not to be treated as nuisances or troublemakers but rather as welcomed participants in the vindication of environmental interests.'" *Friends of the Earth v. Consolidated Rail Corp.*, 768 F.2d 57, 63 (2d Cir. 1985) (quoting *Friends of the Earth v. Carey*, 535 F.2d 165, 172 (2d Cir. 1976) (referring to citizen suit provision of the Clean Air Act[9]. In addition to authorizing citizen suits under section 505, the CWA provides several opportunities for citizens to participate in governmental enforcement activities. Indeed, as noted previously, the last phrase of section 505(b)(1)(B) provides that if a citizen suit is barred by the EPA's or the state's diligent prosecution of a judicial action, "in any such action in a court of the United States any citizen may intervene as a matter of right." [10] 33 U.S.C. § 1365(b)(1)(B).

Also, section 309(g) contains provisions for public participation in administrative actions brought by the EPA. Section 309(g)(4)(A) requires the EPA to provide public notice of and reasonable opportunity to comment on the proposed issuance of any order assessing civil administrative penalties under section 309(g). 33 U.S.C. § 1319(g)(4)(A). In addition, section 309(g)(4)(B) provides that anyone who comments on the proposed assessment of an administrative penalty shall be notified of the hearing and "shall have a reasonable opportunity to be heard and to present evidence." 33 U.S.C. § 1319(g)(4)(B). Any person who comments on the proposed

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[9]The citizen-suit provision in the CWA was modeled after the provision in the Clean Air Act. S. Rep. No. 414, *supra*, at 79, *reprinted in* 1972 U.S.C.C.A.N. at 3745.

[10]Apparently Congress limited intervention of right under section 505(b)(1)(B) to cases in federal court because, under general principles of federalism and state sovereignty, Congress likely would have no authority directly to provide citizens the right to intervene in state-court enforcement actions.

assessment of civil penalties may obtain judicial review of such assessment. 33 U.S.C. § 1319(g)(8).

Moreover, the federal regulations that list the requirements for state enforcement authorities administering NPDES programs provide, in part:

> Any State administering [an NPDES] program shall provide for public participation in the State enforcement process by providing either:
>
> (1) Authority which allows intervention as of right in any civil or administrative action to obtain remedies specified in paragraphs (a)(1), (2) or (3) of this section by any citizen having an interest which is or may be adversely affected;[11] or
>
> (2) Assurance that the State agency or enforcement authority will:
>
> (i) Investigate and provide written responses to all citizen complaints submitted pursuant to the procedures specified in § 123.26(b)(4);
>
> (ii) Not oppose intervention by any citizen when permissive intervention may be authorized by statute, rule, or regulation;[12] and
>
> (iii) Publish notice of and provide at least 30 days for public comment on any proposed settlement of a State enforcement action.

40 C.F.R. § 123.27(d).[13]

In addition, the importance of public participation in the enforcement of the CWA has been recognized by several courts interpreting section 309(g)(6)(A). That section provides, in part, that "any . . . violation with respect to which a State has commenced and is diligently prosecuting an action under State law comparable to this subsection ... shall not be the subject of a civil penalty action under [section 1319(d) . . . or section 1365 of this title [the citizen suit provision]]." 33 U.S.C. § 1319(g)(6)(A). One issue that has repeatedly arisen in citizen suit litigation is whether a state's scheme for administrative enforcement actions is "comparable to" the federal provisions, sufficient under section 309(g)(6)(A) to preclude a citizen suit. In making this determination, courts often focus on whether the state's enforcement mechanisms contain provisions to ensure adequate participation by private individuals in administrative enforcement actions. *See, e.g., Arkansas Wildlife Fed'n v. ICI Americas, Inc.* 29 F.3d 376, 381 (8th Cir. 1994) (holding that, to be comparable to federal law for purposes of section 309(g)(6)(A), state law must "provide interested citizens a meaningful opportunity to participate at significant stages of the decision-making process, and adequately safeguard □ their

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[11]The South Carolina Rules of Civil Procedure contain a provision for intervention of right. Rule 24(a) provides:

> Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

S.C. R. Civ. P. 24(a).

[12]The South Carolina rules also allow for permissive intervention. *See* S.C. R. Civ. P. 24(b).

[13]Under these regulations, "Any State program approved by the Administrator shall at all times be conducted in accordance with the requirements of [Part 123, which is entitled, 'State Program Requirements']." 40 C.F.R. § 123.1(f).

legitimate substantive interests"), *cert. denied*, 115 S. Ct. 1094 (1995); *North & South Rivers Watershed Ass'n v. Scituate*, 949 F.2d 552, 556 n.7 (1st Cir. 1991) ("So long as the provisions in the State Act adequately safeguard the substantive interests of citizens in enforcement actions, the rights of notice and public participation found in the State Act are satisfactorily comparable to those found in the Federal Act."); *Atlantic States Legal Found. v. Universal Tool & Stamping Co.*, 735 F. Supp. 1404, 1415 (N.D. Ind. 1990) ("'[I]n order to be comparable, a State law *must* provide for a right to a hearing and for public notice and participation procedures similar to those set forth in section 309(g) . . . .'") (quoting 133 Cong. Rec. S737 (daily ed., Jan. 14, 1987)).

Thus, the issue presently before the court involves a delicate balance between the Act's preference for governmental enforcement efforts and the recognized policy of allowing private citizens to participate in the enforcement process. Of course, the overriding concern is to assure vigorous enforcement of the CWA to achieve the stated goals of the Act.

The Plaintiffs argue that DHEC's prosecution of Laidlaw in June 1992 was not sufficiently diligent under section 505(b)(1)(B) to preclude their citizen suit. The Plaintiffs challenge both the procedural aspects of the DHEC lawsuit and also the substance of the settlement agreement. In determining whether DHEC's lawsuit against Laidlaw was diligently prosecuted, the court will analyze the Plaintiffs' allegation of lack of diligence "against the background of the agency action." S. Rep. No. 414, *supra*, at 80, *reprinted in* 1972 U.S.C.C.A.N. at 3746; *see also SPIRG v. Fritzsche, Dodge & Olcott, Inc.*, 579 F. Supp. 1528, 1535 (D.N.J. 1984) ("An evaluation of 'diligence' measures comprehensively the process and effects of agency prosecution."), *aff'd on other grounds*, 759 F.2d 1131 (3d Cir. 1985).

The Plaintiffs allege several procedural defects to support their claim that the DHEC action should not preclude

their citizen suit. First, DHEC filed its complaint and consent order in state court on the very last day of the statutory sixty-day notice period during which it was possible under section 505(b) for a state-court action to preclude a citizen suit. Second, the complaint was filed at the Defendant's request, solely to accommodate the Defendant's desire to bar a citizen suit. The Plaintiffs contend that the judicial action served no purpose of DHEC beyond that provided by the usual administrative enforcement action. Third, Laidlaw drafted the state-court complaint and settlement agreement, filed the lawsuit against itself, and paid the filing fee. And finally, the settlement agreement between DHEC and Laidlaw was entered into with unusual haste, without giving the Plaintiffs the opportunity to intervene.

Although the procedural aspects of DHEC's June 9, 1992 action against the Defendant are somewhat suspect, they do not, in and of themselves, establish a lack of diligent prosecution.[14] *Cf. Atlantic States Legal Found. v. Universal*

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[14]The Plaintiffs argue that DHEC's action against Laidlaw was collusive and, therefore, that the lawsuit should have no preclusive effect under section 505(b)(1)(B). The Plaintiffs analogize the preclusive effect of section 505(b)(1)(B) to that of res judicata. As the Plaintiffs observe, a collusive action has no preclusive effect under res judicata. *See Morris v. Jones*, 329 U.S. 545, 550-51 (1947) ("'A judgment of a court having jurisdiction of the parties and of the subject matter operates as res judicata, in the absence of fraud or collusion . . . .'") (quoting *Riehle v. Margolies*, 279 U.S. 218, 225 (1929)). To support their claim of collusion, the Plaintiffs cite the following definition of the term "collusive action":

> An action not founded on an actual controversy between the parties to it, but brought for [the] purpose of securing a determination of a point of law for the gratification of curiosity or to settle rights of third persons not parties. Such actions will not be entertained for the courts will decide only "cases or controversies."

Black's Law Dictionary 265 (6th ed. 1990) (citing *City & County of San Francisco v. Boyd*, 140 P.2d 666, 669, 670 (Cal. 1943)).

The court does not find that the action between DHEC and Laidlaw in June 1992 was the product of fraud or collusion between the parties. Such a finding does not, however, mean that DHEC's action was diligent prosecution for purposes

Tool & Stamping Co., 735 F. Supp. at 1416 (finding that state's prosecution was not diligent because, *inter alia*, counsel for the defendant "walked through" the interlocutory consent decree for approval in the offices of the state agency in a single day; procedure was highly unusual as the approval and signing of such decrees usually requires four to six weeks). The court is quite concerned, however, that because DHEC settled its action against Laidlaw only one day after the lawsuit was filed the Plaintiffs simply had no chance to intervene. *See Love v. New York State Dep't of Envtl. Conservation*, 529 F. Supp. 832, 843-44 (S.D.N.Y. 1981) (in holding that state failed to diligently prosecute an administrative action, the court cited, *inter alia*, the lack of opportunity for the citizen plaintiffs to intervene); *Sierra Club v. SCM Corp.*, 572 F. Supp. 828, 830-31 (W.D.N.Y. 1983) (holding that "where settlement of permit violations is achieved as a result of enforcement proceedings in which plaintiffs, as members of the public, lacked the opportunity to be heard on the merits of the proposed consent order, a citizens suit pursuant to 33 U.S.C. Section 1365(a)(1) may properly be entertained by a federal district court"). Because of the importance of public participation in the enforcement processes of the CWA, as discussed above, the absence of a meaningful opportunity for the citizen plaintiffs to intervene in this case triggers a heightened scrutiny into the settlement of the underlying case between DHEC and Laidlaw. In examining the totality of the circumstances surrounding DHEC's prosecution of Laidlaw, the court is compelled to conclude that this procedural deficiency weighs in favor of the Plaintiffs.

The Plaintiffs also contend that the substantive provisions of the Consent Order between DHEC and Laidlaw demonstrate that DHEC's state-court action was not diligently

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of section 505(b)(1)(B).

prosecuted. The Plaintiffs identify several aspects of the Consent Order that they allege demonstrate a lack of diligence on the part of DHEC. First, the Consent Order did not provide that the court's jurisdiction would continue in order to enforce the decree, but only that the Defendant's violations of the order's terms would subject it to "additional enforcement action." Consent Order and Decree, at 5, ¶ 13 (June 9, 1992) (Def. Ex. 167). The Consent Order also provides that DHEC's complaint to be dismissed. *Id.* at 4, ¶ 1. In addition, DHEC did not obtain an injunction requiring the Defendant to comply with its permit; instead, the Consent Order merely required the Defendant to "use every effort" to comply with its mercury limit. *Id.* at 5, ¶ 10. Furthermore, the Consent Order did not contain stipulated penalties for future violations of the Defendant's permit. The Consent Order provides:

> This Consent Order constitutes a full, fair, reasonable, and complete settlement of the allegations contained in the complaint filed in this case, and all other claims covered by this Consent Order, *including all claims Plaintiff [DHEC] might have arising out of or in any way connected with alleged violations of NPDES Permit No. SC0040517.*

Id. at 4, ¶ 4 (emphasis added). The Consent Order further provides that the Defendant will be discharged from liability for "any and all violations occurring during the period covered by this Consent Order." *Id.* at 6, ¶ 14. Finally, the Consent Order extended for an indefinite period into the future, until the Defendant demonstrated compliance with the mercury limitation of its permit. *Id.* at 6, ¶ 15.

The mere fact that a settlement reached by the state is less burdensome to the defendant than the remedy sought in the complaint in the citizen suit does not establish that the state failed to prosecute its action diligently. *See Connecticut Fund*

for the Environment v. Contract Plating Co., 631 F. Supp. at 1294. However, the lack of substantial relief in a settlement is properly considered by the court in determining whether the state action was diligently prosecuted. *See New York Coastal Fishermen's Ass'n v. Department of Sanitation*, 772 F. Supp. 162, 168 (S.D.N.Y. 1991) (holding that the state's prosecution was not diligent because it allowed permit compliance to be delayed and because the state agency had acted "as a pen pal, not a prosecutor"); *Atlantic States Legal Found. v. Universal Tool & Stamping Co.*, 735 F. Supp. at 1416 (finding that state's enforcement activities did not constitute diligent prosecution because the state's administrative proceeding had little effect upon the defendant's efforts to comply with its permit and because the state assessed a lenient penalty of only $10,000 for hundreds of violations, which were susceptible of a $25,000 penalty per violation). In addition, a state's failure enforce its consent order constitutes some evidence that its prosecution was not diligent. *See Atlantic States Legal Found. v. Universal Tool & Stamping Co.*, 735 F. Supp. at 1416; *Love v. New York State Dep't of Envtl. Conservation*, 529 F. Supp. at 844; *Sierra Club v. SCM Corp.*, 572 F. Supp. 828, 831 n.3 (W.D.N.Y. 1983). The court determines that these deficiencies alleged by the Plaintiffs are not, in and of themselves, dispositive or the issue of diligent prosecution. However, when viewed in light of all of the circumstances surrounding DHEC's settlement with Laidlaw, these factors also weigh in favor of allowing the Plaintiffs' lawsuit to proceed.

The Plaintiffs' strongest challenge to DHEC's diligence in prosecuting Laidlaw relates to the amount of the penalty imposed for Laidlaw's NPDES violations. A lenient penalty that is far less than the maximum penalty may provide evidence of non-diligent prosecution. *Atlantic States Legal Found. v. Universal Tool & Stamping Co.*, 735 F. Supp. at 1416. As the Plaintiffs observe, the penalty obtained by DHEC was far less than the maximum possible penalty. According to the Fact

Sheet accompanying DHEC's May 21, 1992 Notice of Enforcement Conference, the DHEC lawsuit concerned 227 permit violations between April 1991 and March 1992. Def. Ex. 159. Since the maximum penalty under the South Carolina Pollution Control Act is $10,000 per day of violation, S.C. Code Ann. § 48-1-330 (Law. Co-op. 1987), DHEC could have sought a penalty from the Defendant as high as $2,270,000. As noted above in the findings of fact, however, DHEC's initial penalty request was only $120,000, and DHEC and the Defendant ultimately agreed to a penalty of only $100,000. Furthermore, the Consent Order purports to cover all of the Defendant's violations of its permit, even though the DHEC Notice of Enforcement Conference does not list many of the violations alleged in the Plaintiffs' complaint.

The Plaintiffs' most persuasive argument that DHEC's lawsuit against Laidlaw was not diligent prosecution is that in imposing the civil penalty of $100,000 against Laidlaw, DHEC failed to recover, or even to calculate, the economic benefit that Laidlaw received by not complying with its permit. Economic benefit refers to the amount of money that Laidlaw allegedly saved by delaying the purchase, installation, and maintenance of equipment necessary to comply with its NPDES permit in a timely fashion.

The civil penalty provisions in the CWA are intended to reduce pollution of the nation's waterways by deterring persons from violating the requirements of the Act. *See Hawaii's Thousand Friends v. City & Council of Honolulu*, 821 F. Supp. 1368, 1394 (D. Haw. 1993) (citing *Tull v. United States*, 481 U.S. 412, 422-23 (1987)). A penalty serves as a successful deterrent only if potential violators believe that they will be worse off by not complying with the applicable requirements.[15] *See Atlantic States Legal Found. v. Tyson*

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[15]Courts have recognized this principle in contexts other than the Clean Water

Foods, Inc., 897 F.2d 1128, 1141 (11th Cir. 1990) ("Insuring that violators do not reap economic benefit by failing to comply with the statutory mandate is of key importance if the penalties are successfully to deter violations."); *United States v. Roll Coater, Inc.*; 21 Envtl. L. Rep. (Envtl. L. Inst.) 21073, 21075 (S.D. Ind. 1991) ("[U]nless the [defendant] company is fined an amount at least as great as the economic gain in not complying with the regulations, the statute serves little deterrent value."). The court in *PIRG v. Powell Duffryn Terminals, Inc.*, 720 F. Supp. 1158 (D.N.J. 1989), *aff'd in part, rev'd in part*, 913 F.2d 64 (3d Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991), explained well the purposes behind civil penalties:

> Civil penalties seek to deter pollution by discouraging future violations. To serve this function, the amount of the civil penalty must be high enough to insure that polluters cannot simply absorb the penalty as a cost of doing business. Otherwise, a rational profit maximizing company will choose to pay the penalty rather than incur compliance costs. Additionally, the probability that a penalty will be imposed must be high enough so that polluters will not choose to accept the risk that non-compliance will go unpunished.

Act. *See, e.g., United States v. A.A. Mactal Constr. Co.*, 22 Envtl. L. Rep. (Envtl. L. Inst.) 21200, 21201 (D. Kan. 1992) (in determining penalty under the Clean Air Act, stating that "unless the violator is fined an amount at least as great as the economic gain it enjoyed in not complying with the regulations, the statute serves little deterrent value"; and finding that "the recovery economic benefit is essential and that economic benefit should serve as the floor below which the maximum civil penalty should not be mitigated"); *cf. United States v. ITT Continental Baking Co.*, 420 U.S. 223, 231 (1975) (in case under the Federal Trade Commission Act, stating that "Congress was concerned with avoiding a situation in which the statutory penalty would be regarded by potential violators of FTC orders as nothing more than an acceptable cost of violation, rather than as a deterrence to violations.").

Id. at 1166 (citations omitted). Similarly, only by removing the economic benefit of noncompliance can a civil penalty ensure that a violator receives no economic advantage *vis-à-vis* its competitors who comply in a timely fashion with all environmental regulations. *PIRG v. Powell Duffryn Terminals, Inc.*, 913 F. 2d at 80 (quoting S. Rep. No. 50, 99th Cong., 1st Sess. 25 (1985)).

Actually, to serve as an effective deterrent, a civil penalty must recover an amount beyond the economic benefit of noncompliance. If a penalty recovered merely required the polluter to disgorge the benefit it received from noncompliance, then from a purely economic standpoint, a discharger would be indifferent between spending the money necessary to achieve full compliance in a timely manner and ignoring the regulation and simply paying the civil penalty as a cost of doing business.[16] *See SPIRG v. Monsanto Co.*, 29 Env't Rep. Cas.

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[16]Of course, this analysis is somewhat imperfect because it assumes that all violators will be assessed an appropriate civil penalty -- *i.e.*, 100% enforcement. In reality, a violator's expected punishment would be reduced by a certain percentage to represent the proportion of violations that are either never prosecuted or not successfully prosecuted. The reality of imperfect enforcement suggests that civil penalties beyond the amount of the violator's economic benefit should be imposed so that dischargers do not simply gamble that they will not be caught. *See* Michael Levinson, Note, *Deterring Air Polluters Through Economically Efficient Sanctions: A Proposal for Amending the Clean Air Act*, 32 Stan. L. Rev. 807, 12-13 (1980):

> A firm deciding to violate . . . faces an "expected fine" equal to the potential fine discounted by the probability of detection and assessment . . . . In deciding whether to comply, the firm will balance against this cost the benefits that it expects to reap from noncompliance.
>
> Under the economic theory of deterrence the "optimal"-most efficient and effective-economic deterrent is the fine that when discounted by the probability of detection just equal the economic value of noncompliance.

(footnotes omitted).

This analysis also does not account for attorneys' fees or other costs necessary to defend against enforcement actions; nor does the analysis address a

(BNA) 1078, 1090 (D.N.J. 1988) ("To simply equalize the economic benefit with the penalty would serve ill the possibility of discouraging other and future violations. Some additional penalty should be imposed as a sanction.").

Removing a violator's economic benefit is central to the enforcement provisions of the CWA. The civil penalty provision in section 309(d) of the CWA, 33 U.S.C. § 1319(d), requires that the violator's economic benefit be considered in imposing civil penalties. Section 309(d) provides, in part:

> Any person who violates . . . any permit . . . issued under section 1342 of this title by the Administrator, or by a State . . . shall be subject to a civil penalty not to exceed $25,000 per day for each violation. In determining the amount of a civil penalty the court *shall* consider the seriousness of the violation or violations, *the economic benefit (if any) resulting from the violation*, any history of such violation, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require.

33 U.S.C. § 1319(d), (emphasis added).

Congress amended section 309(d) of the CWA in 1987 to add the list of factors, including economic benefit, that courts must consider in determining civil penalties. Water Quality Act of 1987, Pub. L. No. 100-4, sec. 313(c), § 309(d), 101 Stat. 7, 45 (codified at 33 U.S.C. § 1319(d)). Prior to 1987, section 309(d) provided for the imposition of civil penalties, but did not specifically list the factors that should be considered in determining the appropriate amount of the penalty. When

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polluter's loss of good will, or the stigma that attaches to a company that is fined for violating environmental laws.

Congress added these required factors, it adopted the factors that EPA had included in its policy guidelines for assessing penalties under the CWA. *Atlantic States Legal Found. v. Tyson Foods, Inc.*, 897 F.2d at 1142 n.23 ("It appears that Congress took note of the factors listed in the [EPA's penalty] policy when it amended 33 U.S.C. § 1319(d) to require courts to take account of certain specified factors when determining civil penalty awards.").

Under the EPA's 1978 penalty policy, removal of the violator's economic benefit derived from noncompliance was one of four factors to be considered in determining the amount of the penalty to be imposed. EPA, Civil Penalty Policy for Major Source Violators of Clean Air Act and Clean Water Act (Apr. 11, 1978), *reprinted in* Env't Rep. (BNA), Federal Laws 41:1101, 41:1104 (Apr. 27, 1979) (Pl. Ex. 106). The 1978 policy stated that removing the violator's economic benefit "will assure that violators of the law do not economically benefit from their violation [and] ... will assure that violators do not gain an economic advantage over others who incurred costs to obey the law." *Id.* at 41:1102.

Subsequent EPA penalty policies retained and reinforced the emphasis on the removal of the economic benefit of noncompliance. For example, the 1984 penalty policy provides that "it is Agency policy that penalties generally should, at a minimum, remove any significant economic benefits resulting from failure to comply with the law." Policy on Civil Penalties, EPA General Enforcement Policy #GM-21, at 3 (Feb. 16, 1984) (Pl. Ex. 108). Also, the 1986 penalty policy provides that "penalties should, at a minimum, recover the economic benefit of noncompliance," EPA's Clean Water Act Penalty Policy for Civil Settlement Negotiations 1 (Feb. 11, 1986), *reprinted in* 1 Env't Rep. (BNA), Federal Laws 21:911 (Pl. Ex. 109); and that "every reasonable effort shall be made to calculate and recover the economic benefit of noncompliance." *Id.* at 3. The 1986 penalty

policy requires that economic benefit be recovered in a settlement of a judicial action, except in "a limited number of cases" where the settlement amount may be reduced below the economic benefit "based upon a defendant's inability to pay or 'litigation practicalities.'"[17] *Id.*

As the Supreme Court has recognized, the "view of the agency charged with administering the statute is entitled to considerable deference." *Chemical Manufacturers Ass'n v. Natural Resources Defense Council, Inc.*, 470 U.S. 116, 125 (1985). Therefore, the EPA's policy that civil penalties must recover at least the amount of the violator's economic benefit of noncompliance suggests that a state enforcement agency's failure to do so is some evidence that the agency's prosecution was not diligent.

The NPDES Enforcement Agreement entered into between South Carolina and the EPA further demonstrates the importance of recovering economic benefit when the state assesses civil penalties. This agreement requires "the assessment of a civil penalty, when appropriate, based on consideration of established factors (or equivalent sanctions) as part of all civil judicial referrals." NPDES Enforcement Agreement-FY 92 Between the State of South Carolina and EPA, Region IV, at 13 (Apr. 28, 1992) (Pl. Ex. III). The established factors are listed in a footnote and include "the amount of economic benefit resulting from the violation." *Id.* at 13 n.*.

Moreover, DHEC's Uniform Enforcement Policy, which governs the agency's environmental enforcement

[17] Litigation practicalities include such factors as "the probability of proving questionable violations, the probability of acceptance of an untested legal construction," and equitable considerations, such as whether the defendant "reasonably, conclusively, and detrimentally" relied on EPA's representations or actions. *Id.* at 6. The Defendant has not contended that any of these factors were present in its settlement with DHEC.

procedures, states that the guidelines for civil penalty assessment are intended, *inter alia*, to "punish and deter future violations" and "to eliminate economic incentives for noncompliance." DHEC, Uniform Enforcement Policy, sec. III, ¶ 2 (Dec. 12, 1991) (Pl. Ex. 10). The guidelines provide that in assessing a penalty, DHEC may consider "any one or combination of the following factors:"

> (a) Degree of harm or potential harm to the public health, safety, or environment;
>
> (b) Extent of deviation from the requirements of the statute, regulation, standard or permit;
>
> (c) Frequency or duration of the violation. This may include multiple or multi-day violations;
>
> (d) Economic benefit as a result of noncompliance. This may include any evidence of economic advantage gained through noncompliance. In calculating economic benefit, enforcement staff may utilize the EPA computer model as appropriate;
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> (e) Cost of restoration of the environment or abatement of the environmental harm;
>
> (f) Past performance record or past history of violations;
>
> (g) Degree of willfulness and/or negligence;
>
> (h) Other pertinent factors that measure the seriousness or frequency of the violation or the conduct of the party.

Id. at 6.

Although neither DHEC's NPDES Enforcement Agreement with the EPA nor DHEC's Uniform Enforcement Policy explicitly requires DHEC to calculate economic benefit in every case, both documents illustrate the importance of

considering economic benefit when imposing civil penalties.

The Defendant vigorously argues that the alleged failure of DHEC's civil penalty to recover economic benefit does not evidence a lack of diligent prosecution. The Defendant concedes that the CWA requires the consideration of economic benefit when civil penalties are assessed in the following three circumstances: (1) an administrative enforcement action by the Administrator pursuant to section 309(g)[18]; (2) a judicial action in federal court by the Administrator pursuant to section 309(b)[19]; and (3) a citizen suit in federal court under section 505(a) that is not barred by the diligent prosecution limitation in section 505(b)(1)(B).[20] However, the Defendant asserts that nothing in the CWA requires a state agency, such as DHEC, which is delegated the authority under section 402(b) to administer the state's own NPDES program, to calculate a violator's economic benefit of noncompliance in a state judicial or administrative enforcement action.

The Defendant's argument misconstrues the nature of the precise issue presently before the court. The issue is not whether the Act explicitly *requires* the state enforcement agency to do anything; rather the issue is whether the state's failure to calculate economic benefit is evidence of non-diligent prosecution so that the citizen suit can proceed under section 505(b)(1)(B). The court agrees that no language in the CWA

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[18]Section 309(g)(3) provides that "[i]n determining the amount of any penalty assessed under this subsection, the Administrator . . . *shall* take into account [*inter alia*] economic benefit or savings (if any) resulting from the violation." 33 U.S.C. § 1319(g)(3).

[19]"Such action would be governed by section 309(d) discussed above. 33 U.S.C. § 1319(d).

[20]Section 505(a) provides that "[t]he district court shall have jurisdiction . . . to apply any appropriate civil penalties under section 309(d) of this title." 33 U.S.C. § 1365(a).

directly requires a state enforcement agency to calculate economic benefit when determining what an appropriate civil penalty should be. In other words, the CWA does not require states to replicate federal standards or procedures for assessing penalties under the state's water pollution control laws. However, if a state's enforcement mechanisms fail to meet the standard for diligent prosecution under section 505(b)(1)(B), then the state's action would not preclude a subsequent citizen suit under section 505(a) of the Act.

The Defendant also asserts that the diligence of DHEC's prosecution is demonstrated by the fact that the EPA did not overfile[21] in this case, nor has the EPA ever overfiled in a case in South Carolina where DHEC did not calculate economic benefit. This argument is fallacious, however, because the standard for when the EPA overfiles in a state enforcement action is not the same as the "diligent prosecution" standard under section 505(b)(1)(B) below which a citizen suit may proceed.

The regulations governing state NPDES programs provide, "A civil penalty assessed, sought, or agreed upon by the State Director under paragraph (a)(3) of this section shall be appropriate to the violation." 40 C.F.R. § 123.27(c). The note accompanying this particular subsection provides that "[t]o the extent that State judgments or settlements provide penalties in amounts which EPA believes to be substantially inadequate in comparison to the amounts which EPA would require under similar facts, EPA, when authorized by the applicable statute,

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[21]Under the Act, the EPA retains authority to enforce permits in states that administer their own delegated or approved NPDES programs. *See* 33 U.S.C. § 1342(i). Although a state has the primary responsibility for enforcing permits under its own program, the EPA may take action "principally where [the] State is 'unwilling or unable' to take 'timely and appropriate' enforcement action," EPA, Policy Framework for State EPA Enforcement Agreements 21 (Aug. 1986). The term "coverfiling" refers to the EPA's filing a federal enforcement action against a defendant that has been previously sued by a state for the same type of violations.

may commence separate actions for penalties." *Id.*, Note. Whether the amount of a state's penalty is "substantially inadequate" is not, however, the same inquiry as whether the state diligently prosecuted the violator for purposes of section 505(b)(1)(B).

Also, the EPA's decision not to file a separate action to recover additional penalties does not indicate that the penalty was adequate or that the state's prosecution was diligent. The CWA does not require the EPA to overfile a state enforcement action whenever the state assesses "substantially inadequate" civil penalties; rather, the Act gives the EPA the discretion to overfile in such cases. If the diligence of a state agency's prosecution in a particular case were established by the fact the EPA did not elect to overfile in that case, then the citizen suit provisions of the CWA would be rendered meaningless. Under the Defendant's theory, a citizen could never bring a private enforcement suit that challenged the adequacy of a state prosecution: If the EPA did not overfile, the citizen would be barred by the diligent prosecution standard of section 505(b)(1)(B); and if the EPA did overfile, there would presumably be no need for the citizen to bring a private action. Clearly Congress did not intend for the EPA's oversight authority to subsume the oversight authority given to private citizens through the citizen suit provisions of the Act.

The primary purpose of citizen suits is to allow private persons to take action to enforce the law when the EPA or the state, or both, have failed to do so adequately. *See* S. Rep. No. 414, *supra*, at 80, *reprinted in* 1972 U.S.C.C.A.N. at 3746 "[I]f the court viewed the agency action as inadequate, it would have jurisdiction to consider the citizen action notwithstanding any pending agency action."; 118 Cong. Rec. 33,716 (Oct. 4, 1972) (statement of Sen. Bayh), *reprinted in* Senate Comm. of Public Works, 93d Cong., 1st Sess., *Legislative History of the Water Pollution Control Act Amendments of 1972*, at 217 (Comm. Print 1973) [hereinafter *"CWA Legislative History"*] ("Citizen

suits . . . can be a very important tool for keeping industry and Government alike from letting standards and enforcement slip."). As the Department of Justice states in its brief as *amicus curiae*, "Inaction by the state or federal government is not a justification for dismissing a citizen suit; instead, it is the principal justification for allowing such a suit to go forward."

The Defendant next argues that the EPA has tacitly sanctioned DHEC's failure to consider economic benefit when assessing civil penalties, because EPA has not withdrawn the state's authority to operate its own NPDES program. This argument is also fallacious because the criteria for withdrawing a state's authority to administer its own NPDES program are not the same as the criteria for allowing citizens under section 505(b)(1)(B) to "overfile" a state enforcement proceeding. Withdrawal of a state's authority to administer its NPDES program is a drastic remedy that the EPA would not, and should not, undertake lightly. *See* 118 Cong. Rec. 10,241 (Mar. 27, 1982) (Statement of Rep. Reuss), *reprinted in CWA Legislative History*, *supra*, at 452 "[A] total takeover [by the EPA of a state NPDES program] would result in chaos both at the State and Federal level. It should be exercised only when there is clear evidence that the entire State program has fallen into disrepair."); *see also Sierra Club v. SCM Corp.*, 572 F. Supp. 828, 830 n.1 (W.D.N.Y. 1983) (rejecting defendant's argument that the citizen "plaintiffs' exclusive remedy for the apparent lack of public participation in the [state agency's] administrative proceedings is to petition the Federal Government to withdraw its approval of the New York State enforcement program for failure to comply with the Federal Requirements and Standards").

During the hearing on this matter, as well as in its briefs submitted in this case, the Defendant repeatedly remarked that the 1.3 ppb mercury limit was overly stringent and that the Defendant, at all times, proceeded reasonably and in good faith in attempting to comply with the limit. These arguments do not,

however, require the court to dismiss the Plaintiffs' citizen suit.

This court is not the appropriate forum for the Defendant to challenge the propriety of the effluent limits in its NPDES permit. The Defendant's attack on its permit's mercury limit should be, or should have been, raised in a direct appeal of the permit or in a request for a site-specific variance from the permit; it should not be raised in this action.

In addition, under the Clean Water Act a violation of an NPDES permit is a strict liability offense. *Eg., Stoddard v. Western Carolina Regional Sewer Authority*, 784 F.2d 1200, 1208 (4th Cir. 1986); *PIRG v. Elf Atochem North America, Inc.*, 817 F. Supp. 1164, 1178 (D.N.J. 1993); *United States v. CPS Chem. Co.*, 779 F. Supp. 437, 442 (E.D. Ark. 1991). Thus, the reasonableness or *bonafides* of an alleged violator's efforts to comply with its permit is not relevant in determining whether a violator is liable under the Act. *See United States v. Ohio Edison Co.*, 725 F. Supp. 928, 934 (N.D. Ohio 1989).[22]

At the hearing, the Defendant also argued that the amount of the fine imposed against Laidlaw is itself evidence of diligent prosecution because it was the third or fourth most severe penalty for a water pollution violation in DHEC history. This argument is also unavailing because the history of civil penalties imposed by DHEC is irrelevant to the issues presently before the court. If DHEC's method for calculating civil penalties is inadequate because it does not ensure the recovery of the violator's economic benefit, then a comparison to past DHEC penalties certainly cannot show diligence.[23]

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[22]Of course, a violator's good-faith efforts to comply with the applicable requirements may be considered as a factor in determining the appropriate amount of a civil-penalty). 33 U.S.C. § 1319(d).

[23]The Defendant further argued that DHEC's diligence is demonstrated by the fact that DHEC's average penalty for an NPDES violation is one of the highest averages among the state agencies in the southeastern United States that operate

Finally, the Defendant argues that this court should not require DHEC to calculate economic benefit in every case because the agency simply does not have the resources to make such calculations. However, this argument actually supports rather than rebuts the Plaintiffs' argument that DHEC's failure to recover economic benefit demonstrates the agency's lack of diligent prosecution against Laidlaw. If a state agency does not have the resources to adequately enforce permits under its NPDES program by ensuring that violators of the permits do not benefit from noncompliance, then private citizens should be

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averages among the state agencies in the southeastern United States that operate their own NPDES programs. The Defendant stated that if DHEC's enforcement efforts were any more diligent, or more stringent, then industry would leave South Carolina in favor of other states with more relaxed environmental enforcement.

This is an improper argument to make before this court. The court's sworn duty is to apply the laws as written by Congress.

The legislative history of the Clean Water Act indicates that the drafters of the Act debated the potential problem that some states might loosen their environmental standards to attract industry and jobs. However, the solution to such a problem is uniform federal enforcement of the Act. *See* 118 Cong. Rec. 10,241 (Mar. 27, 1972) (statement of Rep. Reuss), *reprinted in CWA Legislative History, supra*, at 452:

> "[T]he greatest political barrier to effective pollution control . . . is the threat of our worst polluters to move their factories out of any state that seriously tries to protect its environment. It is the practice of playing off one State against the other. It is the false but strident cry of the polluter that clean air and clean water mean fewer jobs.
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> . . . .
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> . . . [T]he answer to threats is uniformity. The only way to stop polluters from political intimidation is to prevent them from raising the alternative of moving to a place where pollution is allowed. There should be no such place in this country. We can no longer tolerate the fact that the price of diligence is intimidation. We should have uniform standards of pollution control in all fifty States-tough standards, fair standards, a set of meaningful and comprehensive rules that permit neither exception nor evasion. Pollution does not stop at State boundaries and neither must its regulation."

(quoting testimony of then Governor Wendell R. Anderson of Minnesota before the House Public Works Committee (Dec. 9, 1971)).

able to assist enforcement efforts by bringing a citizen suit. As the Eighth Circuit has recognized, "agency inaction is precisely the circumstance in which private action is appropriate." *United States EPA v. City of Green Forest, Ark.*, 921 F.2d 1394, 1405 (8th Cir. 1990), *cert. denied*, 502 U.S. 956 (1991) (citing *SPIRG v. Georgia-Pacific Corp.*, 615 F. Supp. 1419, 1427 (D.N.J. 1985) ("Defendant's interpretation of the Act would render citizen suits impossible when they are required most: instances where an agency encourages a polluter to believe its unlawful behavior will go unpunished.")).

Furthermore, were this court to rule that DHEC's failure to consider Laidlaw's economic benefit of noncompliance is evidence of non-diligent prosecution, the court would not be requiring DHEC to calculate economic benefit in future enforcement actions. If DHEC continues not to perform such a calculation in assessing civil penalties, however, a judicial enforcement action by DHEC might not be considered diligent under section 505(b)(1)(B) so as to preclude a citizen suit. In making such a conclusion, the court would not be condemning or invalidating the state's enforcement procedures; rather, the court would merely be allowing the citizen suit to supplement the state's enforcement efforts-exactly what Congress envisioned the role of the citizen suit to be.

Accordingly, the court determines that because recoupment of a violator's economic benefit of noncompliance is central to the enforcement of the CWA, the failure of the state enforcement agency to recover, or even to determine, a violator's economic benefit is strong evidence that the agency's prosecution of that violator was not diligent for purposes of section 505(b)(1)(B) of the CWA.

The determination of economic benefit is susceptible to several different methods of calculation. As the Third Circuit court of Appeals observed, "Precise economic benefit to a polluter may be difficult to prove. The Senate Report accompanying the 1987 amendment that added the economic

benefit factor to section 309(d) recognized that a reasonable approximation of economic benefit is sufficient to meet the plaintiff's burden on this factor." *PIRG v. Powell Duffryn Terminals Inc.*, 913 F.2d 64, 80 (3d Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991). Specifically, the Senate Report provides that "[t]he determination of economic benefit or other factors will not require an elaborate or burdensome evidentiary showing. Reasonable approximations of economic benefit will suffice." S. Rep. No. 50, 99th Cong., 1st Sess. 25 (1985).

The court determines that the methodology suggested by Dr. Kavanaugh--the capital-asset pricing model--is a reasonable method of calculating the Defendant's economic benefit of noncompliance. *See Atlantic States Legal Found. v. Universal Tool & Stamping Co.*, 786 F. Supp. 743, 751 (N.D. Ind. 1992) (using defendant's average return on equity of 16.1% to calculate the economic benefit of delayed installation of equipment for four years). An equity rate, such as that employed by the capital-asset pricing model, provides the best approximation of the return the violator could have earned by delaying or avoiding expenses that are necessary for compliance with its permit.

As noted earlier, the court declines, in this order, to make a specific finding on the precise amount of the Defendant's economic benefit of noncompliance.[24] For purposes of the matter presently before the court, however, the court finds that the economic benefit substantially exceeds the $100,000 fine imposed by DHEC and that DHEC's penalty therefore failed to recover the Defendant's economic benefit of noncompliance.

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[24]Of course, if the Plaintiffs ultimately succeed on the merits of their citizen suit, the court is required by sections 505(a) and 309(d) of the Act to include a calculation of economic benefit, as well as the other statutory factors, in assessing an appropriate civil penalty. 33 U.S.C. § 1365(a).

IV. CONCLUSION

For all of the foregoing reasons, the court concludes that DHEC's lawsuit against Laidlaw, which was filed in South Carolina state court on June 9, 1992 and settled by consent order on June 10, 1992, does not constitute diligent prosecution under section 505(b)(1)(B) of the Clean Water Act. Therefore, the Plaintiffs' citizen suit, which was filed on June 12, 1992, is not barred by the state agency's prior judicial enforcement action.

The court's conclusion that DHEC's action against Laidlaw was not "diligent prosecution" as that term is used in section 505(b)(1)(B) of the Act is not intended, nor should it be interpreted, to cast any aspersions on DHEC's enforcement personnel. The court recognizes that DHEC is responsible for monitoring many aspects of the health and welfare of the citizens of South Carolina and that the agency must fulfill its duties with limited resources. The citizen suit provision of the Clean Water Act, like similar provisions in other environmental statutes, is intended to allow private citizens to supplement enforcement efforts whenever the governmental agencies, because of a lack of resources or some other reason, cannot or do not adequately enforce environmental standards.

The effect of the court's present ruling is merely to allow the Plaintiffs' citizen suit to proceed beyond the threshold limitation of section 505(b)(1)(B). This order does not address the merits of the Plaintiffs' action.

The court will issue a separate scheduling order, contemporaneously with this order, to establish a deadline for substantive motions and a trial date for the remaining issues in the case.

IT IS SO ORDERED.

Joseph F. Anderson, Jr.
United States District Judge

April 7, 1995
Columbia, South Carolina

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Friends of the Earth, Inc., Citizens Local Environmental Action Network, Inc., and Sierra Club,	)	
	)	C/A No. 3:92-1697-17
Plaintiffs,	)	
	)	FINDINGS OF FACT,
v.	)	
	)	CONCLUSIONS OF LAW,
Laidlaw Environmental Services (TOC), Inc.,	)	
	)	AND ORDER
Defendant.	)	

This is an action brought pursuant to the citizen suit provision in Section 505 of the Federal Water Pollution Control Act Amendments of 1972, commonly known as the Clean Water Act, 33 U.S.C. § 1365. In their amended complaint, plaintiffs, Friends of the Earth ("FOE") and Citizens Local Environmental Action Network, Inc. ("CLEAN"), seek declaratory and injunctive relief, civil penalties, costs, and attorneys' fees from the defendant, Laidlaw Environmental Services (TOC), Inc. ("Laidlaw").

I.
INTRODUCTION

The Roebuck Plant and the 1987 Permit

Laidlaw owns and operates a hazardous waste incinerator located in Roebuck, South Carolina. As part of that facility, Laidlaw maintains a wastewater treatment plant for water used in air pollution control devices for the incinerator. Laidlaw discharges the treated wastewater into the North Tyger River pursuant to a National Pollutant Discharge Elimination System ("NPDES") permit issued by the South Carolina Department of Health and Environmental Control ("DHEC").

Plaintiffs FOE and CLEAN initiated this action on June

12, 1992[1]. On July 1, 1992, Laidlaw moved to dismiss the plaintiffs' action, arguing that this citizen suit was barred by Section 505(b)(1)(B) of the Act, because DHEC had previously brought a lawsuit against Laidlaw for the same alleged violations of its permit. The plaintiffs responded by arguing that DHEC's lawsuit did not preclude the citizen suit because, *inter alia*, DHEC did not "diligently prosecute" its action against Laidlaw.

In its Order dated December 14, 1992, the court initially denied Laidlaw's Motion to Dismiss and ordered that an evidentiary hearing be held on the issue of whether plaintiffs' citizen suit could proceed. The court received a total of seven days of testimony on this matter in October, November, and December of 1993. In a subsequent memorandum opinion and order, this court held that DHEC's civil action against Laidlaw had not been diligently prosecuted and, as a result, allowed plaintiffs' lawsuit to proceed. *Friends of the Earth v. Laidlaw Environmental Services (TOC), Inc.*, 890 F. Supp. 470 (D. S. C. 1995).

In May 1995, the parties filed cross-motions for summary judgment. In addition, Laidlaw, with support from various *amicus curiae*, requested that this court either reconsider its ruling that DHEC's prosecution was not diligent or certify this question to the Fourth Circuit Court of Appeals. On June 27, 1995, the court denied Laidlaw's Motion for Reconsideration or Certification, denied plaintiffs' Motion for Partial Summary Judgment and granted, in part, Laidlaw's Motion for Summary Judgment. As to Laidlaw's summary judgment motion, the court held that plaintiffs' allegations of effluent discharge violations other than mercury were barred under *Gwaltney v. Chesapeake Bay Found., Inc.*, 484 U.

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[1] At a hearing held on November 19, 1992, the Court granted plaintiffs' oral motion to join the Sierra Club as an additional plaintiff pursuant to Fed. R. Civ. P. 21.

S. 49 (1987), as they were not ongoing at the time the lawsuit was filed.

This court is authorized to decide this case on the merits pursuant to Section 505 of the Act, 33 U. S. C. § 1365. The court may use its equitable powers to enforce effluent standards or limitations and may impose an appropriate penalty, if any, in addition to the $100,000 penalty previously assessed against defendant in the DHEC lawsuit.

This case was tried before the court on July 31, 1995, through August 2, 1995. After the trial, this court held its decision in abeyance because a pending proceeding before a state Administrative Law Judge (regarding a change in the permit at issue in this case) could conceivably have an impact on this court's decision. When the ALJ's decision contained a finding that appeared to be at odds with some of the evidence in this case, this court, *sua sponte*, reopened the record in this case so as to receive additional evidence on what appears to be a critical issue. The parties engaged in brief discovery on this issue and then advised the court that it would not be necessary to conduct an additional evidentiary hearing because the discovery had resulted in a stipulation by the parties on this issue. Accordingly, the stipulation was added to the record in this case. *See* Stipulation and Order dated December 20, 1996.

After receiving the testimony, carefully considering all the evidence, weighing the credibility of the witnesses, reviewing the exhibits and briefs, and studying the applicable law, this court makes the following Findings of Fact and Conclusions of Law pursuant to Fed. R. Civ. P. 52. The court notes that to the extent any of the following Findings of Fact constitute Conclusions of Law, they are adopted as such, and to the extent any Conclusions of Law constitute Findings of Fact, they are so adopted.

II.
FINDINGS OF FACT[2]

The plaintiffs are non-profit corporations which bring this action on behalf of their members to protect their environmental, health, economic, recreational, and aesthetic interests in the quality of the North Tyger River and waters downstream.

The defendant is a South Carolina corporation which owns and operates a hazardous waste incinerator (hereinafter "the facility") in Roebuck, Spartanburg County, South Carolina. As part of the facility, Laidlaw operates a wastewater treatment plant to treat water from the air pollution control system which is associated with the incineration process. The treated wastewater is discharged into the North Tyger River.

Laidlaw purchased the facility from ABCO Industries, Inc. ("ABCO") in early 1986. During the balance of 1986, Laidlaw did not operate under its own NPDES permit; rather, the facility operated temporarily under the permit that had been issued to ABCO.

On December 15, 1986, pursuant to Section 402 of the Clean Water Act, 33 U. S. C. Section 1342, DHEC issued to Laidlaw NPDES Permit No. SC0040517, effective January 1, 1987 ("the 1987 Permit"), for the facility's wastewater treatment plant. The permit authorized Laidlaw to discharge limited quantities of pollutants into the North Tyger River in accordance with the conditions set forth in the permit. The permit limited Laidlaw's discharge of antimony, arsenic, cadmium, chromium, copper, lead, mercury, nickel, total organic carbon, total dissolved solids, total suspended solids,

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[2] Many of the preliminary findings of fact contained in this opinion have already been recited in the court's April 7, 1995 order allowing this suit to go forward. They are repeated here because they relate to the merits of the case as well.

and zinc. The permit also regulated the flow, temperature, toxicity, and pH of the effluent from the facility. In addition, the permit imposed monitoring and reporting obligations, such as the requirement to maintain discharge monitoring reports ("DMRs") and laboratory reports.

Several of the effluent limits contained in Laidlaw's 1987 Permit were more stringent than those under ABCO's permit. The most significant reduction was in the mercury limit, which DHEC proposed to reduce from 20 parts per billion (ppb) under ABCO's permit to 1. 3 ppb in the 1987 permit. The basis of this reduction was DHEC's use of the recently promulgated EPA 1986 Quality Criteria for Water, commonly referred to as the Gold Book.

Because Laidlaw's permit contained such a drastic reduction in the mercury limit, DHEC took two additional steps concerning the reduction. First, it imposed an interim limit of 10 ppb from January 1, 1987, to December 31, 1987. The limit decreased to 1. 3 ppb on January 1, 1988. In connection with the interim limit, DHEC directed, in the permit, that Laidlaw conduct a feasibility study by March 31, 1987, of installed and available mercury removal systems to determine whether the mercury limit of 1. 3 ppb could be satisfied[3].

Second, DHEC included a reopener clause in the 1986 Permit that would have allowed Laidlaw to petition for a higher mercury limit once the company had investigated and installed the best available technology in the attempt to achieve 1. 3

[3] The language of the 1987 Permit requiring a feasibility study reads as follows:

> The Permittee shall conduct a study of installed and available mercury systems to determine the feasibility of achieving the mercury limit on page 3 of this permit. A report of the study shall be submitted on March 31, 1987.

ppb[4]. The reason for including this reopener was that DHEC was uncertain whether any technology existed that would allow Laidlaw to comply with a daily maximum limit of 1. 3 ppb.

In August 1986, prior to the issuance of a permit to Laidlaw by DHEC, Laidlaw contacted Environmental Technology Engineering, Inc. ("ETE"), an environmental consulting firm, for the purpose of conducting the above referenced feasibility study. This study was completed and submitted to DHEC in accordance with the permit. In this study, ETE concluded that removal of mercury to 1. 3 ppb was an "extremely difficult and complex problem," inasmuch as all available manufacturer's information and reliable equipment on the market at that time demonstrated that current technology was capable of reducing mercury only down to a range of 2 ppb to 5 ppb.

As part of the feasibility study, ETE evaluated eight possible technologies, and ultimately narrowed the focus to two technologies, activated carbon and ion exchange, for bench and pilot scale testing. The actual testing of these technologies, which was done in accordance with accepted engineering practices, was conducted between June and December 1987.

Based on ETE's bench and pilot scale testing, the consulting firm concluded that a second carbon adsorption unit, to be run in series with Laidlaw's existing carbon unit, would enable Laidlaw to meet the 1. 3 ppb mercury limit. Even though ETE's recommendations to this effect were not finalized until December, 1987, promising results of early testing of this technology motivated Laidlaw to begin work on the second

[4] The "re-opener" clause of the 1987 Permit reads as follows:

> Upon submittal of the report on mercury removal called for in the schedule of compliance and if requested by the Permittee, the mercury limit on page 3 of this permit may be reconsidered.

carbon adsorption unit in 1987. Accordingly, Laidlaw received a permit for construction of the second carbon unit in February, 1987, and constructed the unit during the remainder of that year.

In early 1988, Laidlaw began operation of the second carbon adsorption unit. Because of ETE's recommendation that this technology would enable Laidlaw to meet the 1. 3 ppb mercury limit, Laidlaw chose not to exercise its option under the permit of petitioning for a higher mercury limit at that time.

Despite ETE's testing, the additional carbon unit did not allow Laidlaw's facility consistently to achieve the 1. 3 ppb mercury limit. As a result, in September 1988, DHEC and Laidlaw entered into a consent order, in response to which Laidlaw contracted with RMT, Inc. , a second environmental consulting firm, to fully re-evaluate the facility's wastewater treatment system and to make recommendations for correcting the problems Laidlaw was continuing to have with excursions of mercury and other metals. During the latter part of 1988, RMT investigated four conceptual approaches to treating the effluent from Laidlaw's facility. In December 1988, RMT submitted a preliminary engineering report to DHEC recommending the testing of three metals removal systems. These systems, trade named Unipure, Lancy and Memtek, each employed a different technology for metals removal.

During 1989, Laidlaw and RMT conducted bench and pilot testing on the Lancy, Unipure and Memtek wastewater treatment systems. The proposed schedule for completion of these studies was discussed with DHEC officials Mike Young and Andy Yasinsac. DHEC thereafter gave written approval of the pilot studies schedule. Also during 1989, Laidlaw applied for and received approval from DHEC to replace its two existing cooling towers with a single, more advanced cooling system. The purpose of this change was to eliminate occasional temperature excursions that Laidlaw experienced during the summer months.

On December 28, 1989, Laidlaw submitted the results of RMT's pilot testing to DHEC. Laidlaw, thereafter, selected the Lancy system and requested approval from DHEC for its installation. DHEC approved Laidlaw's request and issued the required construction permit on July 10, 1990. The manufacturer of the Lancy system (U. S. Filter[5]) gave Laidlaw a conditional guarantee that the system would enable Laidlaw to comply with the mercury limit.

During the latter half of 1990 and the first two months of 1991, the Lancy system was constructed and installed at Laidlaw's facility. This installation work was performed in accordance with the compliance schedule submitted to and approved by DHEC. Between February and July, 1991, Laidlaw began full scale operation of the Lancy system and engaged in "debugging" activities related to its full implementation. During this period, all remaining pH problems were solved and the system effectively removed all metals to NPDES limits with the exception of mercury.

In responding to the continuing problems with mercury, Laidlaw worked both with DHEC and Lancy to make operational adjustments to the system in an effort to achieve compliance with the mercury limit. When it was ultimately determined that mercury excursions were continuing to occur, Laidlaw put pressure on U. S. Filter, the manufacturer of the Lancy system to correct the problem. U. S. Filter responded by recommending numerous testing procedures, including the addition of varying amounts of iron sulfate, copper sulfate, and free sulfide. These tests were unsuccessful, however, in reducing the mercury content below

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[5] During the course of its dealings with Laidlaw, the vendor of the Lancy system has changed its name several times. The company is currently known as U. S. Filter. For ease of reference, that name is used throughout this opinion.

the NPDES limit. U. S. Filter thereafter determined that achieving the 1. 3 ppb limit was problematic because it appeared that the level of metals being introduced to the wastewater treatment system was simply too low for the system to work effectively on mercury[6].

Laidlaw eventually requested relief from the draconian limits of the 1987 Permit, but not until June 26, 1991, when it requested a higher site specific mercury limitation. The request was based on the proposition that the 1. 3 ppb mercury limit was a water-quality based limitation that was not needed to meet the water-quality standards of the Tyger River. This request, therefore, was not made pursuant to the reopener clause of the 1987 Permit, which allowed for reconsideration of the mercury limit based on technology considerations. Laidlaw abandoned the June 26, 1991 water quality-based request after DHEC rejected the fish study that defendant had submitted in support of its request as inconclusive.

DHEC enforcement officials began preparation of a fact sheet to initiate enforcement action in early 1992, after a series of abnormally high mercury excursions occurred at the facility in December 1991. In May 1992, DHEC served a formal enforcement document on Laidlaw regarding the facility's continued mercury excursions.

On June 5, 1992, DHEC held an enforcement conference with Laidlaw. Subsequent meetings and telephone conferences to negotiate a consent agreement occurred later in the day on June 5, 1992, as well as on June 8, 1992. The parties reached a final consent agreement on June 9, 1992, and a judicial complaint was filed in the Court of Common Pleas in Spartanburg County, South Carolina on that date. On June 10, 1992, a state circuit judge approved the

[6] As discussed later in this section, the metal mix and total metal level impacts the effectiveness of the system due to certain chemical interactions.

settlement of the DHEC lawsuit.

After the consent order was entered, Laidlaw continued to explore additional technologies to remedy its continuing mercury problems. Laidlaw experimented with various operational changes to the system and performed tests utilizing chemicals and technologies both recommended by its consultants and developed internally by Laidlaw personnel. As the mercury problems continued to be investigated, Laidlaw had to shut down the incinerator altogether for substantial periods of time in 1992, in an effort not to violate either its mercury parameter or the judicial consent order then in effect.

The solution to meeting the 1.3 ppb limit was ultimately achieved by Laidlaw personnel through experimentation utilizing activated carbon, micro-filtration, and ion exchange. Laidlaw discovered, subsequent to June 1992, that adding activated carbon filters to the end of the Lancy system effectively reduced the mercury level below 1.3 ppb, so long as Laidlaw severely limited the feed rate of mercury containing waste into the incinerator.

Although it was initially believed that micro-filtration and ion exchange were necessary to sustain compliance with permit levels, testing revealed that these technologies did not improve the efficiency of mercury removal and they were ultimately abandoned. The addition of carbon adsorption technology to the end of the Lancy unit has enabled Laidlaw to consistently achieve compliance with all of the parameters contained in its NPDES permit, and, following an extended period of demonstrated full compliance, DHEC agreed to allow the judicial consent order to expire. DHEC so notified the state court in a letter dated August 6, 1993, from DHEC attorney William Ready to the Spartanburg, South Carolina Circuit Court. On August 17, 1993, the state court entered an order of final judgment bringing the state lawsuit to an end.

The 1993 and 1994 Permits

On December 31, 1991, Laidlaw initiated efforts to renew the 1987 Permit and to amend the permit limit for mercury excursions. As a result of these efforts, DHEC issued a new permit ("the 1993 Permit") setting forth new and corrected permit limits for a number of constituents, including mercury.

Like the 1986 Permit, the 1993 Permit contained only a daily limit, not a monthly average, for mercury. Laidlaw appealed the conditions of the 1993 Permit, contending that the limits in the permit had been calculated incorrectly. DHEC thereupon agreed to reissue the permit (now known as the 1994 Permit) so as to provide a new daily maximum of 10 ppb and a monthly average of 1.25 ppb for mercury. The reason for two permit limits is that the Clean Water Act regulations had been amended since the 1987 Permit was issued so as to require that NPDES permits address both the acute (short term) and chronic (long term) impacts of discharges on the receiving water body. This is accomplished by a daily maximum[7] limit (to control the acute impact) and a monthly average[8] limit (to control the chronic impact). DHEC records show that the daily maximum *could have* been set as high as 200 ppb under the EPA Gold Book criteria, but DHEC set the limit at 10 ppb based on Laidlaw's previously demonstrated ability to achieve such a limit.

The 1994 Permit, therefore, significantly altered

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[7] A daily maximum limit is, as the term suggests, the maximum amount permitted on a given day.

[8] The term "monthly average" is somewhat misleading. A monthly average of a substance reflects the average amount of the substance discharged per day, based on an average of measurements taken for that substance over the course of a month.

Laidlaw's discharge obligations in two respects: It established a monthly average where none had existed before, and it increased the daily maximum to more than seven times what it had been previously.

FOE and CLEAN challenged DHEC's relaxing of the permit limits, filing a Petition for Administrative Review with Chief Administrative Law Judge Marvin F. Kittrell. In their appeal, the petitioners alleged that the daily maximum limit for mercury in the 1994 Permit violated the general "anti-backsliding"[9] rule because the limit was higher than the limit in Laidlaw's 1987 Permit. The appeal to Judge Kittrell was pending when this court conducted its July 1995 trial.

Because a final decision on the new permit could possibly impact on the remedial aspects of this case, the court announced at the conclusion of the July 1995 trial that it would reserve final judgment on the merits of this case until Judge Kittrell decided the appeal. On January 25, 1996, Judge Kittrell upheld the 1994 Permit, thus approving the higher limits for mercury. In doing so, Judge Kittrell found that several exceptions to the anti-backsliding rule had been demonstrated.

On May 9, 1996, Judge Kittrell's decision was affirmed by the DHEC Board by a 4-3 vote. The plaintiffs have appealed the DHEC decision to the South Carolina Circuit (trial) court, and, have indicated they will, if necessary, appeal to the South Carolina Supreme Court. [10]

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[9] Backsliding means the issuing of a permit with less stringent limits than the limits imposed by a previous permit. There are several federal and state regulations prohibiting backsliding, *e. g.* 40 C. F. R. § 122. 44(1)(1994); S. C. Code Regs. 61-9. 122. 44(1)(Supp. 1995), and there are several exceptions to the anti-backsliding rules. These exceptions are set forth in detail in the ALJ's order.

[10] The new permit limits went into effect on June 1, 1996 and will remain in

Not surprisingly, the parties disagree over whether certain findings by Judge Kittrell are binding on this court. Laidlaw argues that this court is bound by certain factual findings made by Judge Kittrell and relied upon by him in approving the higher limits. Plaintiffs contend that this court is not bound by these findings, relying primarily upon the argument that the issues before Judge Kittrell were different. Plaintiffs also argue that some of the factual findings on which Laidlaw relies were not necessary to support Judge Kittrell's decision, which ultimately rested on several different legal theories.

This court need not wade into this thicket. With regard to two of Judge Kittrell's findings relied upon by the defendant (Laidlaw's good faith and lack of harm to the environment), the record before this court leads to findings not inconsistent with those of Judge Kittrell. Accordingly, as to these two issues this court will make its own findings, on the record before it, without affording collateral estoppel effect to the findings of the Administrative Law Judge.

The third component of Judge Kittrell's order that Laidlaw seeks to rely upon in this case relates to the finding that the 1993 Permit erroneously used the chronic value for mercury contained in the EPA Gold Book to derive a daily maximum, or acute, limitation. This error was corrected when the 1994 Permit was issued by DHEC: the Gold Book acute and chronic values were used to establish daily maximum and monthly average mercury discharge limits. Judge Kittrell agreed with Laidlaw that the 1993 Permit was issued in error and that the 1994 Permit corrected the problem.

In this case, Laidlaw seeks to build upon Judge Kittrell's finding that the 1993 Permit was issued incorrectly.

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effect unless plaintiffs are able to convince a circuit judge to award them temporary injunctive relief pending resolution of their appeal.

Laidlaw seeks to have this court conclude that the 1987 Permit was issued incorrectly for the same reasons the 1993 Permit was issued incorrectly. That is to say, DHEC misapplied the Gold Book in Laidlaw's 1986 Permit by deriving the daily maximum limit from the chronic rather than the acute value for mercury.

Laidlaw's argument in this regard fails for two reasons. First, it is well-settled that a NPDES permit holder may not challenge the validity of the permit in an enforcement proceeding. Section 509(b)(2) provides that the terms of a permit "shall not be subject to judicial review in any civil or criminal proceeding for enforcement." 33 U. S. C. 1369(b)(2). This section, therefore, prohibits this court from considering whether defendant's 1. 3 ppb maximum mercury limitation is erroneous in terms of the liability to be found. In enacting this section, Congress intended to preclude untimely challenges to permit requirements in enforcement proceedings. The Senate Report stated:

> An alleged violation of an effluent control limitation or standard, would not require reanalysis of technological [or] other considerations at the enforcement stage. These matters will have been settled in the administrative procedure leading to the establishment of such effluent control provision.
>
> * * *
>
> Consequently, the factual basis for enforcement of requirements would be available at the time enforcement is sought, and the issue before the courts would be a factual one of whether there had been compliance.

S. Rep. No. 414, 92d Cong. , 1st Sess. 79-80 (1971), reprinted in A Legislative History of the Water Pollution Control Act Amendments of 1972, 93d Cong. , 1st Sess. , vol. 2 (1973)(hereafter "Legis. Hist. "), pp. 1497-1498, also reprinted in 1972 U. S. Code Cong. & Ad. News 3745-3746.

The Senate Report also stated:

> One purpose of these new requirements is to avoid the necessity of lengthy fact finding, investigations and negotiations at the time of enforcement. * * * [T]he threat of sanction must be real, and enforcement provisions must be swift and direct.

S. Rep. No. 414, *supra*, pp. 64-65, 2 Legis. Hist. at 1482-1483, 1972 U. S. Code Cong. & Ad. News at 3730-3731.

Defendant's remedy, if it believed that its 1987 Permit was invalid for any reason, was to seek an administrative adjudication pursuant to South Carolina law. South Carolina law provided defendant with the opportunity to challenge its permit in an administrative proceeding (S. C. Code of Laws, Volume 25, Regulation 61-72) and to have the administrative determination reviewed by a state court (S. C. Code Ann. 1-23-380 (Law. Co-op. 1995)). Defendant never pursued this remedy.

The second reason that Judge Kittrell's analysis of the 1993 Permit does not impact upon the 1987 Permit lies in the fact that, as Judge Kittrell himself acknowledged, DHEC was under no legal obligation to establish a monthly average limitation in the 1987 Permit, or even to use the Gold Book's acute value for mercury to establish a daily maximum limit. This is, quite simply, because the regulations governing such permits were different in 1986.

The decision by Judge Kittrell to approve a monthly

average and a higher daily maximum for the renewed permit does, however, have significant ramifications for this case. First, the new limits are important in determining whether any injunctive relief should be awarded. Second, the fact that the daily maximum (10 ppb) is now over seven times the old 1. 3 ppb limit of the 1987 Permit (and indeed could have been as high as 200 ppb but for Laidlaw's demonstrated ability to reduce its mercury effluent to levels substantially below 200 ppb) will impact on the penalty imposed in this case.

Laidlaw's Compliance Efforts

Regarding the issue of good faith compliance, plaintiffs contend that Laidlaw did not act in good faith in obtaining adequate pollution control equipment and failed to exercise proper operational controls during the time that the mercury excursions were occurring. Plaintiffs contend that Laidlaw should have purchased the Memtek System rather than the Lancy Wastewater Treatment System. They argue that Lancy was selected because it was less expensive than Memtek and they also point out that Memtek was willing to provide a stronger guarantee regarding the mercury limit. Plaintiffs also contend that Laidlaw could have simply restricted its feed rate of mercury in order to achieve compliance with the 1. 3 ppb limit and that, by not so doing, demonstrated a disregard for its permit limits.

Although the facts in this case disclosed that Lancy was somewhat less expensive than Memtek and its guarantee was somewhat more conditional than Memtek's guarantee, the court determines that the decision to purchase the Lancy system was reasonable under the circumstances. Specifically, DHEC was involved with Laidlaw and its consultants in the process of developing and approving the Lancy treatment technology and both Laidlaw and the manufacturer of the Lancy system (U. S. Filter) believed that the treatment technology employed would

be sufficient to meet the 1.3 ppb limit.

Memtek guaranteed that its system would allow Laidlaw to comply with the 1.3 ppb mercury limit. U.S. Filter initially guaranteed that the Lancy system would allow Laidlaw to comply with "most" of its permit limits. However, U. S. Filter told Laidlaw that "[w]hile the pilot tests results on mercury removal were encouraging, the limit is so low that we cannot at this time guarantee that the 1.3 ppb limit can be met." After additional treatability studies, U.S. Filter provided a conditional guarantee that the Lancy system would enable Laidlaw to comply with the mercury limit. *See* Stipulation and Order dated December 20, 1996.

This guarantee was tied to four operating conditions. Laidlaw clearly met the first three conditions. The fourth operating condition stated that the addition of metals/salts "may be beneficial to the [mercury] removal process." In other words, the conditional guarantee required that non-mercury metals might have to be added to the wastewater to ensure that the balance between mercury and non-mercury metals was at the level necessary to obtain optimal mercury removal by the Lancy system. The reason that there must be a balance between the mercury and non-mercury metals is that if there is not a sufficient level of non-mercury metals in the wastewater to react with the sodium sulfide that is added to the wastewater as part of the treatment process, then the mercury will remain in a soluble form that is not filtered out of the wastewater by the Lancy system. Instead, the mercury is discharged in the effluent. If there is a sufficient level of non-mercury metals to react with the sodium sulfide, the mercury becomes insoluble and is filtered out of the wastewater.

Shortly after the Lancy system was installed on March 15, 1991, Laidlaw began experiencing problems with meeting its mercury limitation. U. S. Filter first recommended adding iron to its wastewater. After receiving approval from DHEC, Laidlaw added iron, which ultimately proved unsuccessful in

bringing about compliance.

In July 1991, U. S. Filter recommended adding copper to the wastewater. DHEC initially refused to allow this addition. After additional discussions, however, DHEC approval was obtained, and copper was added. This also proved unsuccessful.

The solution to meeting the 1.3 ppb limit was ultimately achieved by Laidlaw personnel through experimentation using additional treatment technologies. Laidlaw discovered, subsequent to June 1992, that adding activated carbon filters to the end of the Lancy system effectively reduced the mercury level below 1. 3 ppb, so long as Laidlaw severely restricted the feed rate of mercury-containing waste into the incinerator.

Under these facts, this court finds that Laidlaw acted reasonably in selecting the Lancy system and bringing it on-line.

The second issue regarding good faith compliance relates to plaintiffs' contention that Laidlaw could have resolved mercury excursions by simply restricting the feed rate of mercury-containing waste into the incinerator. On the record before it, however, the court determines that there is no simple linear relationship between the amount of mercury in the feed-rate and the amount of mercury in the effluent.

Thus, the court determines that Laidlaw acted in good faith once it decided to bring the Lancy system on-line. It must be remembered, however, that the court has already determined that the Lancy system should have been selected and installed sooner than it was. *Friends of the Earth v. Laidlaw Environmental Services (TOC), Inc.* , 890 F. Supp. at 483. This court's finding in this regard predated the decision of ALJ Kittrell. Thus, there can be no argument that the court is bound by the ALJ's finding in this respect.

This court's finding of good faith on the part of Laidlaw in regard to the installation of the Lancy system is, therefore, tempered by the fact that Laidlaw waited longer than it should

have to install the system[11]. Additionally, this court has previously determined that other mercury removal equipment that the defendant installed in 1992 and 1993 should have also been brought on-line by January 1, 1988[12].

Harm to the Environment

Laidlaw introduced the results of its nine years of semiannual acute and chronic toxicity tests, the results of the fish tissue study conducted by RMT on bluegill sunfish from the North Tyger River, and the results of the subsequent fish tissue study conducted by DHEC on large mouth bass and other species of fish in the river. Based on these tests, the supporting testimony of Laidlaw's expert witness Dr. Sam White, and the testimony of various DHEC witnesses, this court finds that the water quality standard for mercury is currently being attained in the North Tyger River and that the overall quality of the river exceeds levels necessary to support propagation of fish, shellfish, and wildlife, and recreation in and on the water.

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[11] For reasons discussed later in this order, this court has, however, determined that the on-line date should be January 1, 1988, rather than January 1, 1987.

[12] The conditional guarantee issued by U. S. Filter was the reason the court reopened the record subsequent to the ALJ decision. When the record closed in this case on August 2, 1995, the only documents in the record indicated that U. S. Filter would guarantee the Lancy system would meet all of the permit requirements except for mercury. The ALJ, on the other hand, determined that U. S. Filter guaranteed that Lancy would meet *all* permit requirements. This led to this court's decision to re-open the record. As noted previously, the parties engaged in discovery and then submitted a stipulation to the court regarding the nature of the U. S. Filter guarantee. The court views the new evidence brought into this case by way of the stipulation to be significant, because the record had theretofore indicated that U. S. Filter specifically excluded mercury from its guarantee. As indicated in the body of this opinion, although U. S. Filter initially included such a disclaimer, subsequent negotiations between the parties led to the conditional guarantee upon which the ALJ's finding of good faith was based.

The fish tissue studies performed by RMT and DHEC both showed levels of mercury in the sampled fish well below the Food and Drug Administration (FDA) action level of 1. 0 milligram per kilogram of fish tissue examined. In fact, the DHEC fish study showed no mercury above its detection limit of 0. 25 mg/kg, less than one quarter of the level necessary to trigger the FDA action level.

Laidlaw's macroinvertebrate assessments, which were performed two times per year between 1986 and 1994, and 96-hour flow-through bioassays, which were also performed during this same time period, showed that prior mercury discharge limits as high as 20 ppb had no adverse effect on the indigenous biological community in-the North Tyger River downstream from Laidlaw's facility. Thus, there has been no showing of any significant harm to the environment in this case.

Permit Violations

1. Mercury Exceedances

Laidlaw has violated the daily maximum mercury limitations of the 1987 Permit a total of 489 times. Laidlaw does not dispute these mercury exceedances, which are summarized on the following table:[13]

DISCHARGES IN VIOLATION OF PERMIT					
YEAR	1% to 100% over permit level	101% to 400% over permit level	401 to 1000% over permit level	more than 1000% over permit level	Total number of violations
1987	11	2	--	--	13
1988	29	22	11	6	68
1989	30	28	1	1	60
1990	28	20	5	3	56
1991	91	60	10	5	166
1992	51	60	8	4	123
1993	1	--	--	--	1
1994	--	1	--	--	1
1995	1	--	--	--	1
TOTAL	242	193	35	19	489

As can be seen from the table above, most of the exceedances occurred prior to mid-1992, while Laidlaw was experimenting with various technologies to bring the plant into compliance. Only nine of the exceedances occurred after June 1992.

[13] A more detailed table of the mercury exceedances between 1986 and 1995 is attached to this order as Appendix A.

2. Monitoring and Reporting Violations

Laidlaw has committed 420 violations of the monitoring requirements of the permit and 503 violations of the reporting requirements. These violations are summarized on Plaintiff's Revised Exhibits 77-79, and 97, and 95 Tr. 181-82, 187.

There is a degree of overlap in these calculations, however, because the monitoring violations are also considered reporting violations[14]. There have been 10 reporting requirements violations and 13 monitoring requirements violations since the complaint in this action was filed in June 1992.

A significant number of the reporting and monitoring violations concern technical errors on the forms used by Laidlaw to report its compliance to DHEC. Some of the other monitoring violations relate to things such as the method of sampling used ("grab sample" vs. continuous sampling), the detection level of the mercury monitoring equipment (to a level of 2. 0 ppb rather than 1. 3 ppb), days where no sample was received for metals, and instances where chemical inhibitions or interferences existed in the wastewater effluent samples, which prevented mercury detection below 2. 0 ppb.

CONCLUSIONS OF LAW

Appropriate Relief

This court has jurisdiction over the parties to this action and the subject matter of this action.

[14] Of the 503 reporting violations, 305 involve failure to report discharge violations (as opposed to monitoring violations) properly.

1. Civil Penalty

When a violation of the Act is established, a civil penalty is mandated by Section 309(d) of the Act, 33 U. S. C. § 1319(d). *Stoddard v. Western Carolina Regional Service Authority*, 784 F. 2d 1200, 1208 (4th Cir. 1990). Section 505(a) of the Act, 33 U. S. C. § 1365(a), authorizes this court to assess "any appropriate civil penalties under Section 309(d) of [the] Act. " Prior to its amendment in 1987, Section 309(d), 33 U. S. C. § 1319(d), provided for a civil penalty not to exceed $10,000 per day of violation. In 1987, Congress increased the statutory maximum penalty to $25,000 per day. 101 Stat. 45 (1987).

Pursuant to Section 309(d) of the Clean Water Act, the court is directed to consider the following six factors in determining whether a civil penalty should be assessed in addition to the $100,000 penalty Laidlaw has already paid: (1) the seriousness of the violation or violations; (2) the economic benefit (if any) resulting from the violations; (3) any history of such violations; (4) the defendant's good faith efforts to comply with the applicable requirements; (5) the economic impact of the penalty on the defendant; and (6) such other matters as justice may require.

(a) Seriousness of Violations

Mercury is an extremely toxic pollutant. Mercury can take various forms, including elemental mercury, inorganic mercury, and organic mercury. Organic mercury, or methylmercury, is the most toxic. While most of the mercury that Laidlaw discharges is in the inorganic form, inorganic mercury can methylate, or take its organic form, in sediments, water, or fish tissue.

Preliminarily, the court confirms its ruling at trial sustaining the objection of Laidlaw to certain exhibits proffered

by the plaintiffs (Trial Transcript 1 at 67). Plaintiffs attempted to introduce the EPA's March 1995 Interim Clean Water Act Settlement Penalty Policy. This policy includes, among other considerations, a "gravity component" that employs the use of various factors and considerations in arriving at this particular portion of the penalty. As pointed out by Laidlaw, the policy expressly states that it is not to be used by a court in determining a penalty at a trial. Inasmuch as plaintiffs have not articulated any reason why this court should ignore the plain language of the policy, it will not be considered in arriving at an appropriate penalty amount. The same is true of plaintiffs' Exhibit 133 setting forth the actual calculations made by the plaintiffs applying the factors set forth in the EPA penalty policy.

The court does consider the plaintiffs' selection of a value range of 1-10 under gravity factor B to be probative, however. Gravity factor B involves consideration of health and environmental harm in setting a penalty and, pursuant to the EPA's penalty policy, there are four possible value ranges: 10-50, 1-10, 4-50, and 2-25. The value range of 1-10 selected by the plaintiffs is clearly the range that is indicative of the least amount of health or environmental harm. In fact, the use of this particular value range simply indicates that a water quality-based effluent standard was exceeded and not that any health or environmental harm resulted from that exceedance. In cases where there is an impact on human health, the penalty policy provides a value range of 10-50. Similarly, where there is a fish kill, beach closing, or restrictions on the use of a water body, a value range of 4-50 is indicated. Where there is some other type of impact on the aquatic environment, the appropriate value range is 2-25. The plaintiffs' use of the 1-10 value range constitutes an acknowledgment that the NPDES permit violations at issue in this citizen suit did not result in any health risk or environmental harm.

Concerning the monitoring and reporting violations, the

court recognizes that it has been held that such violations can be considered "serious. " In *Sierra Club v. Simkins Industries, Inc.* , 847 F. 2d 1100 (4th Cir. 1988), the court held that monitoring and reporting violations were serious where the defendant both failed to file any discharge monitoring reports (DMRs) at all for over two and one-half years and further had not even installed monitoring equipment that would have permitted it to comply with its monitoring and reporting obligations. In the case at bar, the monitoring and reporting violations proven to have occurred were a combination of anomalies interfering with properly installed detection equipment, instances where the detection equipment malfunctioned, and technical errors on reporting forms that even DHEC recognizes were a result of confusion as to how to properly complete the forms. These deficiencies were not the result of a failure either to install proper monitoring equipment or to submit timely DMRs.

As the court held in *PIRG v. Yates Industries,* 757 F. Supp. 438, 454 (D. N. J. 1991): "Reporting deficiencies do not produce the type of direct environmental impact which is the primary purpose behind the act. " Moreover, monitoring violations are not considered serious unless they are found to have been in bad faith. *PIRG v. Elf Atochem North America, Inc.* , 36 Env't Rep. Cas. (BNA) 1855, 1867 (D. N. J. 1993).

In this case, Laidlaw's monitoring and reporting deficiencies, all of which have long since been resolved, produced no direct environmental impact. There has been no demonstrated proof of harm to the environment. Moreover, DHEC was made aware on a continuous basis of the compliance problems Laidlaw was experiencing. An open line of communication between Laidlaw and DHEC existed throughout the time period relevant to this litigation. Further, DHEC's knowledge of these problems, its enforcement efforts with respect thereto, and the agency's continued involvement with Laidlaw in achieving a solution to these problems have

resulted in Laidlaw's ultimate compliance with its NPDES permit over an extended period of time. Those monitoring and reporting violations that are technical in nature were not shown to have been a product of bad faith and did not result in DHEC's being mislead or ignorant as to the type or extent of compliance difficulties Laidlaw was experiencing. On this record, the monitoring and reporting violations cannot be said to have constituted "serious" violations of the Act.

The presence or absence of environmental harm is relevant to the assessment of a Clean Water Act penalty. In *Hawaii's 1000 Friends v. City of Honolulu,* 821 F. Supp 368 (D. Haw. 1993), the court was faced with conflicting data regarding whether defendants' Clean Water Act violations had caused environmental harm. . The court concluded that this conflicting evidence was insufficient to demonstrate that harm had actually occurred, and held "the lack of [demonstrated] material harm to be a *significant* mitigating factor in assessing penalties. " 821 F. Supp. at 1395-96. (emphasis added).

The same is true in this case. All available data, including semi-annual acute and chronic toxicity tests performed by Laidlaw over the last nine years, a 1992 fish tissue study conducted by RMT, and a recent fish tissue study conducted by DHEC, fail to show that Laidlaw's *actual* discharges have resulted in harm to the North Tyger River.

Plaintiffs' primary argument regarding this issue centers on the fish tissue study conducted by RMT in 1992. It is plaintiffs' position that this test is inconclusive because it was performed on bluegill sunfish rather than large mouth bass. That study found no fish with mercury bioaccumulation greater than 0. 14 ppm, which is over seven times lower than the FDA action level of 1. 0 ppm. Plaintiffs' expert, Dr. Weiss, looked at a DHEC fish tissue study performed on large mouth bass from an unconnected South Carolina body of water known as the Langley Pond, and extrapolated these results to conclude that large mouth bass in the North Tyger River would exceed

the FDA action limit for mercury.

The DHEC study of large mouth bass in the North Tyger River refutes the conclusion of Dr. Weiss. This study, using detection equipment measuring mercury bioaccumulation at . 25 ppm and higher, detected no mercury in any fish, large mouth bass included, that were analyzed from the North Tyger River.

This test is particularly significant. According to Dr. Sam White, the FDA action level of 1. 0 ppm was established conservatively to protect human health. Protecting fish, on the other hand, would result in a number hundreds of times higher than 1. 0 ppm. The FDA action level was derived from studies of inhabitants of countries where fish are consumed frequently around the world, for example Japan, where it was discovered that no adverse symptoms occur in humans unless the blood level of mercury reaches 200 ppm or greater. In establishing the FDA limit, this minimum symptom threshold was reduced 10 times for safety, and, after being further reduced by other factors, the 1. 0 ppm number was derived.

DHEC's North Tyger River study shows that no fish in that river has a mercury level even one-quarter of a limit that is ten times lower than necessary to protect human health. This test result, considered together with the nine years of acute and chronic toxicity testing data as to the effect of Laidlaw's total effluent on all other aspects of the stream, leads the court to conclude that Laidlaw's effluent, even with the permit exceedances it has experienced, has had no demonstrated adverse affect on the environment.

(b) Economic Benefit of Non-Compliance

As this court held in its April 7, 1995 Order, the capital asset pricing model using an interest rate of 15. 25% is the preferred method of calculating the economic benefit, if any, of non-compliance. Using this methodology, plaintiffs'

economic expert, Dr. Michael Kavanaugh, calculated Laidlaw's economic benefit of non-compliance at $3,139,418. 00. Laidlaw's economic expert, Robert Fuhrman calculated the economic benefit at $884,797. 00. The court finds the economic benefit of non-compliance to be $1,092,581. In so doing, the court adopts most, but not all, of Mr. Fuhrman's analysis.

Preliminarily, the court notes that both experts' calculations involved two types of expenditures: penalty items and credit items. Penalty items involve delayed expenditures that were necessary to bring the facility into compliance with its NPDES permit. Credit items represent expenditures that were either not necessary for compliance or were made because the penalty item equipment was not in place.

The first penalty item set forth in Table 1 of Mr. Fuhrman's report is the neutralization system. Mr. Fuhrman calculates an economic benefit of $303,276 based on a non-compliance date of January 1, 1988. Dr. Kavanaugh, on the other hand, calculates an economic benefit of $675,431 based on a compliance date of January 1, 1987. Mr. Fuhrman performed an alternative calculation using the January 1, 1987 non-compliance date and arrived at the same figure as Mr. Kavanaugh -- *i. e.* , $675,431. Inasmuch as the NPDES permit in question was not issued by DHEC until December 1986, and considering the fact that Laidlaw was given until March 31, 1987 to issue a preliminary feasibility report on achieving the new mercury standard, the court finds that January 1, 1988 is a more realistic and appropriate non-compliance date and thereby adopts Mr. Fuhrman's calculation of $303,276.

The next penalty item is the Lancy system. Mr. Fuhrman calculates an economic benefit of $1,744,000 based on a non-compliance date of January 1, 1988. Dr. Kavanaugh on the other hand calculates an economic benefit of $2,452,000 using a non-compliance date of January 1, 1987. Mr.

Fuhrman presented an alternative calculation to the court using the January 1, 1987 non-compliance date that agrees with Dr. Kavanaugh's calculation. Thus, the only difference between the parties on this particular penalty item is the non-compliance date. For the reasons stated in the immediately preceding paragraph, the court finds that the January 1, 1988 non-compliance date is more appropriate. [15]

Fortunately, the parties are in accord on a number of penalty items: pre-filter ($71,806), gas scrubber study ($15,824), wastewater study ($25,164), ISCO Sampler ($4,856), and miscellaneous one-time expenses ($40,810). The Court agrees and adopts these figures.

As to the credit items, there is sharp disagreement between the parties on several issues. Laidlaw's facility manager, Dale Fentress, testified without contradiction that the ion exchange system and micro-filter piping apparatus are not being operated as part of the facility's wastewater treatment system and in fact were never used on a regular basis. Specifically, Mr. Fentress testified that after the equipment was purchased and installed in 1993, subsequent testing demonstrated that the ion exchange and micro-filter piping equipment were ineffective in further lowering the mercury content of Laidlaw's effluent. In fact, the last time the equipment was used was in November 1994. While plaintiffs' wastewater treatment expert, Dr. Bruce Bell, testified that, in his opinion, Laidlaw did not adequately test the ion exchange and microfiltration equipment, the undisputed fact remains that the equipment has not and is not being used and was, therefore,

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[15] The court's April 7, 1995 order found that the Lancy system should have been installed by January 1, 1987. 890 F. Supp. at 483. Laidlaw subsequently moved to reconsider this finding, supporting its motion with a detailed time line. The court has become convinced that its earlier finding in this regard was in error. The April 7, 1995 order is therefore modified so as to provide that the Lancy system should have been brought on-line by January 1, 1988.

unnecessary for compliance. Since, as noted *supra*, penalty items by definition must be necessary for compliance, the ion exchange and micro-filter systems are not penalty items.

The court finds that Laidlaw purchased the ion exchange and microfiltration systems as part of a reasonable effort to achieve compliance with the very stringent 1. 3 ppb mercury limit but that this equipment was ultimately not necessary to achieve compliance[16]. In other words, Laidlaw spent its money unnecessarily. That raises the important issue of whether the purchase of this unnecessary equipment should be treated as a credit item. Mr. Fuhrman computes a credit of $48,584 and $21,100, respectively, for the ion exchange system and the micro-filter piping. Dr. Kavanaugh, on the other hand, would not extend any credit for the purchase of these two items. He testified that as far as economic benefit is concerned, his analysis treats a willful polluter, who knows what equipment is necessary for compliance but refrains from purchasing it, and a "good faith" polluter, who makes a good faith effort to maintain compliance, the same way. The court adopts Laidlaw's position on this issue. As Dr. Kavanaugh conceded on cross-examination, EPA's policy as set forth in the BEN User's Guide is to allow credits when a company, acting upon the reasonable advice of a competent consultant, purchases equipment that ultimately proves unsuccessful in achieving permit compliance. The court finds this to be a

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[16] Plaintiffs contend that this court has already made a finding that the ion exchange and micro-filter systems were needed and should have been installed by January 1, 1988. In its April 7 order, the court determined that "[a]ll of the mercury removal equipment that the Defendant installed in 1992 and 1993 was necessary to ensure compliance with the 1. 3 ppb mercury limit." 890 F. Supp. at 484. In a strict sense, this finding includes the ion exchange and micro-filter systems. The evidence regarding these two systems, however, was not as fully developed at the earlier hearing. During the July-August 1995 trial, it became clear that this equipment ultimately was not necessary to achieve compliance. The court therefore modifies the April 7, 1995 order to this extent.

reasonable and fair policy. Dr. Kavanaugh explained that he does not give a credit for unsuccessful equipment purchases because he feels that the purchasing company (in this case, Laidlaw) can seek legal redress from either the manufacturer of the equipment or the engineering consultant who recommended its purchase. The court finds this viewpoint impracticable. Obviously, absent an express warranty to the contrary, non-defective equipment purchased upon a reasonable and non-negligent recommendation can nonetheless fail to meet a specified objective -- in this case compliance with the 1. 3 ppb mercury limit.

Applying similar reasoning, the court finds that Mr. Fuhrman's credit of $23,485 for micro-filter rental is appropriate and rejects plaintiff's contention that this good faith rental of unsuccessful equipment should not be counted as a credit item.

The next credit item is the rental of the ISCO Sampler for which Mr. Fuhrman calculates a credit of $5,529. As shown by Plaintiffs' Exhibit 148, Dr. Kavanaugh agrees with this calculation and makes no adjustment to it. Accordingly, the Court will extend a credit of $5,529 for rental of this equipment.

Mr. Fuhrman calculated credits for the next three items, *i. e.* , rental carbon adsorption, 1992 wastewater disposal, and fish tissue study, of $21,332, $24,009, and $18,154, respectively. Dr. Kavanaugh would not extend any credit for these items. The court agrees with Mr. Fuhrman. It must be remembered that Laidlaw is being penalized through the calculation of an economic benefit for delayed expenditures that were necessary for permit compliance. It is undisputed that if these penalty item expenditures had been timely made, Laidlaw would have been in compliance and it would have been unnecessary to spend money on the three credit items at issue. It would be unfair to impose a penalty upon Laidlaw for equipment that it purchased too late while at the same time not

extending a credit for expenditures that clearly would not have been made if those purchases had been timely.

The next credit item is operations and maintenance (O&M) cost. Defendant's Exhibit 245 sets forth the total O&M cost at the facility during the time period of 1988 through 1992. Mr. Fuhrman testified that from this list he selected for a credit those expenditures that would not have been made if Laidlaw had been in compliance with its NPDES mercury limit in a timely fashion. Those items selected for a credit from Defendant's Exhibit 245 are set forth at page 19 of Mr. Fuhrman's July 24, 1995 report. For example, in 1988, Laidlaw spent $139,307. 04 for caustic that it would not have spent had its new pH neutralization system been installed on January 1, 1988. As noted *supra*, Laidlaw is being penalized for the delayed purchase of this system. Given that fact, it is proper that Laidlaw be entitled to a credit for money that it spent in 1988 since this expenditure would have been unnecessary had the neutralization system been in place on January 1, 1988. Mr. Fuhrman's credit of $401,759 is adopted.

The largest credit item involves lost earnings from the voluntary shutdown of the Roebuck incinerator due to Laidlaw's inability to comply with the mercury permit limit. These occurred in June and July of 1992. Mr. Fuhrman calculated that these lost earnings totalled $831,136. To arrive at this figure, he looked at average earnings before interest and taxes of the facility during fiscal year 1992 (August 1991 to September 1992). During this time there was a shutdown of approximately twenty (20) days from June 19 through July 9, 1992, and for this reason these two months were excluded from the calculation. Mr. Fuhrman also excluded January 1992 because of the abnormal amount of shutdown time during that month. He then computed the average earnings for the remaining nine months and compared this average with the earnings during the shutdown months of June and July 1992.

Dr. Kavanaugh approached the shutdown issue differently. His calculations involve a number of scenarios, set forth on Plaintiffs' Exhibit 149. One difference in approach involves Dr. Kavanaugh's inclusion of January 1992 in his calculations as opposed to Mr. Fuhrman's exclusion of that month due to the atypical amount of down time. The court agrees with Mr. Fuhrman's approach. In attempting to calculate the company's normal earnings, it makes more sense to exclude abnormal months.

Another significant difference between these two experts includes Dr. Kavanaugh's use of July 1992 in his calculation whereas Mr. Fuhrman excluded that month because the facility was voluntarily shut down for approximately nine days due to an inability to comply with the mercury limit. Dr. Kavanaugh testified that he used July 1992 because, despite the shutdown, revenues that month were actually above average. His analysis misses the point. Even if the July 1992 revenues were above average, it cannot be seriously disputed that the revenues would have been much higher had the company been operating those nine days. In other words, regardless of what the revenues actually were in July 1992, it is clear that they would have been higher if the company had been able to generate revenues for the nine days that it was not operating.

Dr. Kavanaugh agreed that Laidlaw lost money during the 20 days of shutdown between June 19 and July 9, 1992, but he contended that overall the revenues for 1992 were comparable or better than those in 1991. For the same reason as stated *supra*, this also misses the point. Regardless of what the revenues were in 1992, and regardless of how those 1992 revenues compared to other years, the fact is that the revenues would have been "20 days higher" had Laidlaw not voluntarily shut down the Roebuck facility for 20 days in order to avoid exceeding the mercury parameter of its NPDES permit.

The third significant difference in approach between the two experts involves Mr. Fuhrman's use of a 12-month period

and Dr. Kavanaugh's use of a 34-month period to compute the average monthly earnings of the facility. Mr. Fuhrman testified that he felt that the shorter time frame was more appropriate- because that more accurately reflected market conditions in effect at the time of the June/July 1992 shutdown. By way of example, he testified that if a person wanted to determine how much money he had lost due to being ill and out of work for a month, that person should look at his earnings during the year of the illness and not earnings two or three years earlier. Mr. Fuhrman's approach makes sense and the court adopts it.

Although the court will adopt the basic methodology employed by Dr. Fuhrman in calculating the credit to be allowed for shutdowns, the court agrees with the plaintiffs that not all twenty days of downtime (in June and July 1992) should be credited. The evidence showed that Laidlaw recorded downtime for routine maintenance virtually every month from July 1991 to February 1993, except June and July 1992. Moreover, Laidlaw's plant manager testified that routine maintenance was in fact done during June and July 1992. Accordingly, the court determines that 25% of the 1994 downtime would have been necessary for routine maintenance. The court will, therefore, reduce Fuhrman's downtime credit by twenty-five percent of $831,136 or $207,784. For this reason, Fuhrman's tabulation of the economic benefit of non-compliance with the 1987 permit must be increased by $207,784, to $1,092,581.

Finally, both parties have calculated a credit of $158,607 representing the present value of the June 1992 payment of a $100,000 fine to DHEC. The court agrees and will apply this credit.

A summary of the court's findings regarding the economic benefit of non-compliance with the 1987 permit are set out on the table attached to this order as Appendix B.

(c) History of Violations

All of the permit violations[17] attributable to Laidlaw are set out in the table at Appendix A. The reporting and monitoring violations are set out on Plaintiffs' Revised Exhibits 77-79, and 97 and 95 Tr. 181-82, 187. Because Laidlaw purchased the Roebuck facility from ABCO in January 1986, the court need not look at violations that occurred prior to 1986.

(d) Good Faith Compliance Efforts[18]

This court is required by Section 309(d) of the Clean Water Act, 33 U. S. C. §1319(d), to consider a defendant's good faith effort at compliance in assessing an appropriate penalty for Clean Water Act violations. While a lack of good faith effort would constitute an aggravating factor, a genuine effort to comply, particularly with a highly restrictive NPDES permit limit, will mitigate any penalty that the court might assess. *See U. S. v. Ciampitti*, 669 F. Supp. 684, 700 (D. N. J. 1987) (lack of good faith effort to comply with the law

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[17] Plaintiffs argue that the court must consider all of Laidlaw's permit violations, not just the violations for which Laidlaw is liable. As noted previously, this court removed a number of non-mercury violations from this case under *Gwaltney v. Chesapeake Bay Found., Inc.*, 484 U. S. 49 (1987). Section 309(d)(3) requires the court to consider "any history of such violations" (emphasis added). The court concludes that the use of the word "violations" in subpart (3), as well as subparts (1) and (2), refer to the violations that form the basis of the penalty being contemplated and not past violations, barred under *Gwaltney*, that are not before the court.

[18] As the court observed in its April 7, 1995 opinion, Laidlaw's good faith, or the lack thereof, was not a factor in determining whether the DHEC judicial enforcement proceeding was diligently prosecuted. 890 F. Supp. at 496, n. 22. The penalty phase of this action is, therefore, the first time the court has been required to address the good faith issue.

is aggravating penalty factor); *see also U. S. v. City of Beaumont*, 786 F. Supp. 634, 638-39 (E. D. Tex. 1992) (penalty assessed less than maximum but greater than economic benefit where evidence showed that defendant made no effort to comply with NPDES permit).

Laidlaw presented extensive evidence at the 1993 hearing to demonstrate its efforts to achieve compliance with all parameters in its NPDES permit. These efforts included: (1) contracting with two separate environmental consulting firms to conduct bench and pilot testing of all known technologies for reducing the concentration of mercury and other metals in the waste stream; (2) full scale employment of carbon adsorption technology, followed by sulfide precipitation technology, followed by sulfide precipitation technology combined with carbon adsorption, microfiltration and ion resin exchange technology; (3) the replacement of Laidlaw's cooling system and pH controls; and (4) a drastic reduction of the mercury feed into the incinerator to a small fraction of Laidlaw's RCRA/HSWA permitted feed rate. (Defendant's Exhibit 226).

Following receiving permission from DHEC to construct a treatment system in July 1990, the solution to the non-mercury metals problem was found in March of 1991, with the installation of the Lancy sulfide precipitation system. As this court has previously held, the solution to the mercury problem was not discovered until mid to late 1992, when Laidlaw began utilizing both the Lancy system and carbon adsorption technology together while continuing to severely restrict the mercury feed to the incinerator. 890 F. Supp. at 483.

Laidlaw acted in good faith in relying on qualified environmental consultants to recommend the appropriate technology to solve its wastewater treatment problems. Laidlaw's good faith desire to achieve NPDES compliance is further evidenced by the fact that, after spending more than $1

million on consultants and new wastewater treatment equipment that did not result in compliance. Laidlaw ultimately found the solution through the efforts of its own personnel experimenting with different technologies combined with restricting mercury feed to the incinerator.

Throughout this process, Laidlaw kept DHEC apprised of all efforts to achieve compliance. DHEC was kept apprised of Laidlaw's continuing problems with excursions, and the agency was involved both in reviewing and approving each of the studies, recommendations, and wastewater treatment modifications Laidlaw made to achieve compliance with its permit.

Plaintiffs question Laidlaw's good faith efforts primarily on one ground, that being the allegation that Laidlaw could have resolved its mercury excursions through controlling mercury feed to the incinerator. In support of this assertion, plaintiffs presented a report and chart by Dr. Bruce Bell which indicate that a 79% strength correlation existed between mercury influent and effluent for a period of time extending from March 1991 to December 1992. This report was supplemented by Dr. Bell's testimony that if Laidlaw kept its average mercury feed at 0.01 pounds per day or less, the company could comply with its mercury limit of 1.3 ppb.

This court does not believe that the mercury exceedances Laidlaw experienced were solely a function of the level of mercury fed into the system. While it is obvious that mercury exceedances could be controlled by simply adding no mercury into the system, this is impractical because much of the hazardous waste produced by industry which requires offsite treatment or disposal contains mercury. This is why there is a mercury parameter contained in Laidlaw's permit and it is why Laidlaw installed wastewater treatment equipment to control mercury.

The court also does not accept the argument that Laidlaw could always have achieved mercury compliance by

keeping the mercury feed rate of 0.01 pounds per day. As the court has already found, the solution to Laidlaw's mercury problem was not achieved until Laidlaw, on its own initiative in mid to late 1992, experimented with various technology combinations in addition to reducing the mercury feed. In fact, as Plaintiffs' Exhibits 131 and 150 show, prior to August 1992, Laidlaw restricted the mercury feed to 0.01 pounds per day or less during 20 different months, and the average mercury concentration in the effluent actually exceeded 1.3 ppb 40% of the time. Additionally, there are several examples where the mercury influent far exceeded 0.01 pounds per day but mercury concentration in the effluent was less than 1.3 ppb. Thus, Dr. Bell's contention regarding NPDES compliance at a feed rate of 0. 01 lbs. is not accurate.

Concerning the chart showing a correlation between mercury influent and effluent, Dr. Bell used a twenty-two (22) month period between March 1991 and December 1992, rather than the 5. 5 years of data available to him. This was purportedly because the wastewater treatment plant was "relatively stable" during the period analyzed by Dr. Bell. When it was pointed out at trial that the system was also stable during the period extending at least from December 1988 through March 1991, Dr. Bell could not explain why he did not chart those dates other than to say that his memory must have been faulty as to when things were changing.

In fact, when the entire 5. 5 year time period of time is analyzed, both including periods of equipment stability and change, the alleged strong linear correlation espoused by plaintiffs completely breaks down. More specifically, the linear relationship between mercury influent and effluent decreases to 10% when all of the data is used, and there is no period of time other than the one chosen by Dr. Bell where there is even a 50% relationship between influent and

effluent.[19]

From this analysis, it is clear that Laidlaw could not have achieved compliance with a 1. 3 ppb limit simply by restricting mercury feed, and in fact still cannot do so. Indeed, the testimony of Laidlaw Environmental Manager David DeSha shows that the strict 1. 3 ppb limit has been exceeded twice, in November 1994 and January 1995, when there was no mercury fed into the incinerator at all. The key to controlling mercury effluent is a combination of wastewater treatment efficiency and influent feed. This combination was not achieved until 1992, and fluctuations in mercury feed since that time, usually in the range of 1/6 of an ounce, have not resulted in any mercury excursions.

Laidlaw has thus demonstrated a degree of good faith and, in fact, compliance has now been achieved. This factor warrants a reduction in the penalty.

(e) The Economic Impact of the Penalty Upon the Defendant

In order for this factor to apply, the defendant must establish that a penalty should be reduced because of its economic impact. *PIRG v. Powell Duffryn Terminals, Inc.* , 720 F. Supp. 1158 (D. N. J. 1989).

Plaintiffs' economic expert testified, without contradiction, that Laidlaw could pay a fine of $10 million without any adverse economic impact. For this reason, a fine in the amount determined by this court (see page 40 *infra*) will not force Laidlaw to suffer economic bankruptcy.

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[19] The linear relationship between mercury influent and effluent was 44% from May 1987 to December 1987; 1% from January 1988 to February 1991; 37% from December 1988 through March 1991, when Dr. Bell concedes the system was stable; and only 29% during the March 1991 to December 1992 time period analyzed by Dr. Bell when the two outliers are included in the analysis.

(f) Other Matters As Justice May Require

Several other factors serve to ameliorate the penalty imposed in this case.

1. Laidlaw's Failure to Avail Itself of the Reopener Clause

As this court has already found, Laidlaw was given the option of reopening the 1987 Permit to request a higher limit for mercury once the feasibility studies were completed. 890 F. Supp. at 475-76. It did not, however, do so.

The ETE feasibility study (Defendant's Exhibit 13) noted that the removal of mercury from wastewater to a limit of 1. 3 ppb was "an extremely difficult and complex problem. " It further noted that "there is no inexpensive method to effectively remove mercury to the proposed limit and the technology is still being developed. " At that point in time, faced with such a bleak outlook, Laidlaw could have justifiably returned to DHEC and taken the "easy way out" by requesting a higher limit as authorized by the reopener clause. Instead, Laidlaw followed ETE's recommendation and conducted further studies on the two technologies (carbon filtration and ion exchange) recommended by ETE.

Following this additional evaluation, ETE advised Laidlaw in December 1987, that a second carbon filter in series with the existing carbon filter "*should be* able to meet the 1. 3 ppb required by the NPDES permit. " Defendant Exhibit 30, page 5 (emphasis supplied). Clearly, this rather tentative conclusion fell far short of an unqualified assertion that the two carbon filters would meet the new limit, and at this point in time Laidlaw would again have been justified in returning to DHEC to seek a higher limit under the reopener clause. Instead, Laidlaw elected the more difficult and costly path: install the technology in an attempt to meet the 1. 3 ppb limit. In sum, all parties involved knew that it would be a daunting

task to go from 20 ppb to 1. 3 ppb but Laidlaw elected to try.

2. Recent Compliance History

Related to good faith compliance efforts is the legal principle that a defendant's post-complaint compliance is relevant to the assessment of an appropriate civil penalty. *See FOE v. Facet Industries, Inc.* , 618 F. Supp. 532, 535 n. 1 (W. D. N. Y. 1984). In this case, there has been only one alleged monitoring violation since June 1992, and zero reporting violations since that time. Although Laidlaw experienced eleven mercury excursions between June 12 and October, 1992, there was only one excursion annually in 1993, 1994 and 1995. As indicated above, these latter two mercury excursions occurred even though no mercury was being fed into the incinerator, and these occurrences would not have been excursions but for Plaintiffs' appeal of the new NPDES permit establishing a daily maximum mercury limit of 10 ppb. This compliance history demonstrates that Laidlaw's efforts have remedied its compliance problems and warrants a reduction in the penalty.

3. The Ever-Changing Mercury Limit

The mercury limit for ABCO Industries, which owned the Roebuck plant until it was sold to Laidlaw in 1986, was 20 ppb. The new permit, granted Laidlaw when it purchased the plant, reduced the mercury limit to 10 ppb for 1987 and 1. 3 ppb from 1988 forward. As of June 1, 1996, it is (and will be, unless reversed on appeal) 10 ppb once again. It *could be* 200 ppb but for Laidlaw's demonstrated ability to achieve a much lower limit.

Thus Laidlaw must, for the forseeable future, comply with a mercury limit that is determined in part by the fact that it has purchased the technology to achieve an unusually

restrictive limit. The limit ordinarily would have been much higher.

In *dicta*, the Supreme Court has indicated that a NPDES permittee might be entitled to some consideration for the expenditure of funds in order to achieve a limit lower than what is required. In *Gwaltney v. Chesapeake Bay Foundation*, 484 U. S. 62 (1987), the Court addressed the question of whether citizen suits could be brought for wholly-past violations of the Clean Water Act. In answering this question in the negative, the Court reasoned:

> Suppose that the Administrator identified a violator of the Act and issued a compliance order under § 309(a). Suppose further that the Administrator agreed not to assess or otherwise seek civil penalties on the condition that the violator take some extreme corrective action, such as to install particularly effective but expensive machinery, that it otherwise would not be obliged to take. If citizens could file suit, months or years later, in order to seek the civil penalties that the Administrator chose to forgo, then the Administrator's discretion to enforce the Act in the public interest would be curtailed considerably.

Thus, the Supreme Court, through *dicta*, has indicated that a reduced penalty, or even no penalty, may be appropriate when an administrative sanction is assessed against a violator who has purchased equipment that will allow it to stay far below what would otherwise be required. The court knows of no reason why such a principle should not apply to a judicial

proceeding such as the present one. [20]

(d) Penalty Amount

Although the court finds that Laidlaw's economic benefit equals $1,092,581, the factors set forth in this opinion convince the court that Laidlaw should not be penalized in an amount equal to the economic benefit of non-compliance. In *United States v. Roll Coater, Inc.* , the court indicated in dicta that, although economic benefit is one of the factors to be considered by a court, "other factors may decrease the imposed penalty below the calculated economic benefit. " 21 E. L. R. 21073, 21075 (S. D. Ind. 1991) (emphasis supplied). In *Roll Coater*, the court indicated that such factors could include "evidence of the difficulty of compliance," the fact that there was "no proven damage to the environment, and hence, that the violations were not serious within the meaning of the Act," and the fact that the company worked hand-in-hand with the state agency in an attempt to achieve compliance. *Id.* at 21076-21077. These factors apply in the case at bar. Likewise, in *United States v. Avatar Holdings, Inc.* , the court noted that the "courts' determination of the penalty under the Clean Water Act has been characterized as 'highly discretionary. '" 1996 W. L. 479533, *5 (M. D. Fla. 1996) (cites omitted). Similarly, the court held that a "substantial reduction in the maximum statutory penalty is warranted where the violations caused minimal [or no] environmental damage. " *Id.* at *6. Moreover, the court cannot ignore the fact that the mercury limit has changed significantly while this litigation was pending as further evidence that compliance with the prior, stricter standard was not absolutely necessary to avoid environmental

[20] The court recognizes that the analogy to *Gwaltney* is not perfect. Laidlaw's purchase of technology was in response to the then-imposed 1. 3 ppb limit and not out of a desire to go the extra mile.

harm.

The court establishes a civil penalty according to the following table:

Mercury Exceedances

242 discharges 1% to 100% over permit level @ $200

= $ 48,400

193 discharges 101% to 400% over permit level @ $700

= $135,100

35 discharges 401% to 1,000% over permit level @ $1,000

= $ 35,000

19 discharges more than 1,000% over permit level @ $5,000

= $ 95,000

Monitoring and Reporting Violations

420 monitoring violations @ $100

= $ 42,000

503 reporting violations @ $100

= $ 50,300

$405,800

The above penalty is, on its face, less than half of the economic benefit. It might, therefore, be argued that Laidlaw has ultimately benefitted from its non-compliance and would not, therefore, be deterred from future violations. When the total deterrent effect of this action is considered, however, this

court does not believe this to be the case. That is, in setting the above penalty, this court has considered that Laidlaw will be required to reimburse plaintiffs for a significant amount of legal fees and has, itself, incurred significant legal expenses. Taken together, this court believes the above penalty, potential fee awards, and Laidlaw's own direct and indirect litigation expenses provide adequate deterrence under the circumstances of this case.

2. Equitable Relief

In addition to seeking a monetary penalty, plaintiffs request both a declaratory judgment and injunctive relief. Plaintiffs also ask that this court direct Laidlaw to submit DMRs directly to plaintiffs so that they, along with DHEC and EPA, can monitor Laidlaw's future compliance, and plaintiffs further request all back-up compliance documentation. Laidlaw is not required to submit back-up documentation to DHEC and EPA.

As noted previously, the new limits for mercury (10 ppb daily maximum/1. 25 ppb monthly average) are now in effect unless and until the new permit is reversed by the state courts of South Carolina. For this reason, any injunction issuing from this court would necessarily apply these new, more lenient, standards for mercury.

In order to show that they are entitled to injunctive relief, plaintiffs must demonstrate, at a minimum, that they will suffer irreparable injury if such relief is not granted. *Amoco Production Co. v. Village of Gambell*, 480 U. S. 531, 544-47 (1987); *NRDC v. Texaco Refining and Marketing, Inc.* , 906 F. 2d. 984 (3rd Cir. 1990). Injunctive relief is not appropriate where the defendant is in compliance or in substantial compliance with the Clean Water Act, *PIRG v. Yates Industries*, 757 F. Supp. 438 (D. N. J. 1991); *citing Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982), and a

defendant in substantial compliance with its NPDES permit is not required to show that there is no chance of a future permit violation in order to defeat a request for injunctive relief. *Atlantic States Legal Foundation, Inc. v. Tyson Foods, Inc.*, 897 F. 2d 1128 (5th Cir. 1990).

In this case, Laidlaw has been in substantial compliance with all parameters in its NPDES permit since at least August 1992. This includes mercury, all other metals, temperature, pH and all monitoring and reporting obligations. In fact, Laidlaw has been in compliance with the vast majority of its permit requirements for a much longer period of time, extending back to March 1991 when the Lancy system was installed. The only mercury violations in 1994 and 1995 were at the levels of 2. 7 ppb and 1. 6 ppb, respectively, and these would not have been permit exceedances at all had not plaintiffs by their appeal stayed the effective date of Laidlaw's new NPDES permit containing a daily maximum limit for mercury of 10 ppb. As Laidlaw witness David DeSha testified, without contradiction, these latter two exceedances occurred when there was no mercury being fed to the incinerator, and this demonstrates that it is not possible for Laidlaw to guarantee that there is no chance of a future exceedance of the 10/1. 25 limits now in effect.

Laidlaw's compliance history also must be considered together with the evidence regarding harm to the environment. The lack of demonstrated harm and the fact that Laidlaw is now and has for an extended period of time been in compliance with its permit compels the conclusion that no injunction or other form of equitable relief is appropriate. Accordingly, plaintiffs' request for equitable relief is denied.

CONCLUSION

Based on the foregoing Findings of Fact and Conclusions of Law, the court holds that: this court has

jurisdiction over defendant's violations of its permit and the Clean Water Act; defendant is liable for the violations of the mercury discharge limitation and the violations of the monitoring and reporting requirements of its NPDES permit identified herein; and a civil penalty of $405,800 shall be assessed against defendant for its violations of its permit and the Act. The plaintiffs' request for a permanent injunction is denied.

IT IS SO ORDERED.

Joseph F. Anderson, Jr.
United States District Judge

January 21, 1997
Columbia, South Carolina

APPENDIX A
FRIENDS OF THE EARTH v. LAIDLAW ENVIRONMENTAL SERVICES (TOC)
D.S.C. Civ. No. 1-92-1697-17
CHRONOLOGICAL LIST OF DEFENDANT'S OUTFALL 001 DISCHARGE VIOLATIONS

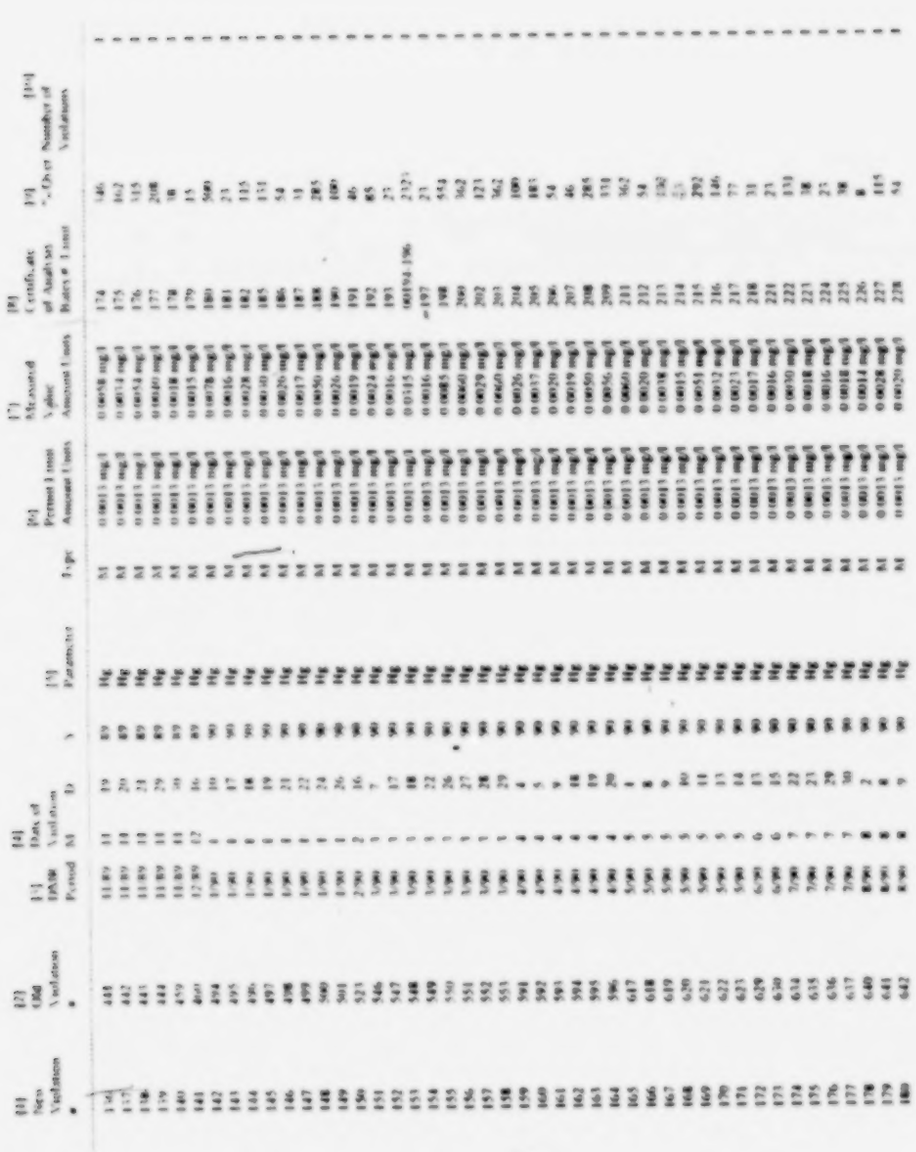
[A] New Violation #	[B] Old Violation #	[C] DMR Period	[D] Date of Violation M	[D] Date of Violation D	[E] Y	[F] Parameter	[G] Permit Limit Amount	[G] Permit Limit Units	[H] Measured Value Amount	[H] Measured Value Units	[I] Certificate of Analysis Ratio # Limit	[J] % Over	[K] Number of Violations
1	21	1Q87	-	24	87	Hg	0.0100	mg/l	0.0145	mg/l	-	45	-
2	22	1Q87	-	25	87	Hg	0.0100	mg/l	0.0247	mg/l	2	147	-
3	23	1Q87	-	26	87	Hg	0.0100	mg/l	0.0180	mg/l	3	80	-
4	24	1Q87	-	27	87	Hg	0.0100	mg/l	0.0166	mg/l	4	66	-
5	25	4Q87	4	7	87	Hg	0.0100	mg/l	0.0197	mg/l	5	97	-
6	26	4Q87	4	8	87	Hg	0.0100	mg/l	0.0240	mg/l	6	140	-
7	27	4Q87	5	6	87	Hg	0.0100	mg/l	0.0154	mg/l	7	54	-
8	28	4Q87	5	7	87	Hg	0.0100	mg/l	0.0101	mg/l	8	1	-
9	29	4Q87	5	8	87	Hg	0.0100	mg/l	0.0142	mg/l	9	42	-
10	30	4Q87	5	9	87	Hg	0.0100	mg/l	0.0146	mg/l	10	46	-
11	31	4Q87	6	10	87	Hg	0.0100	mg/l	0.0130	mg/l	11	30	-
12	32	1Q87	12	7	87	Hg	0.0100	mg/l	0.0118	mg/l	12	18	-
13	33	1Q87	12	29	87	Hg	0.0100	mg/l	0.0130	mg/l	13	30	-
14	34	2Q88	-	30	87	Hg	0.0100	mg/l	0.0215	mg/l	14	115	-
15	35	2Q88	2	1	87	Hg	0.0100	mg/l	0.0128	mg/l	15	28	-
16	36	2Q88	2	2	87	Hg	0.0100	mg/l	0.0183	mg/l	16	83	-
17	37	2Q88	2	3	87	Hg	0.0100	mg/l	0.1000	mg/l	17	1000	-
18	38	2Q88	2	4	87	Hg	0.0100	mg/l	0.0116	mg/l	18	16	-
19	39	2Q88	2	5	87	Hg	0.0100	mg/l	0.0125	mg/l	19	25	-
20	40	2Q88	2	6	87	Hg	0.0100	mg/l	0.0192	mg/l	20	92	-
21	41	2Q88	2	7	87	Hg	0.0100	mg/l	0.0258	mg/l	21	158	-
22	42	2Q88	2	8	87	Hg	0.0100	mg/l	0.0230	mg/l	22	130	-
23	43	2Q88	2	9	87	Hg	0.0100	mg/l	0.0281	mg/l	23	181	-
24	44	2Q88	2	10	87	Hg	0.0100	mg/l	0.0331	mg/l	24	231	-
25	45	2Q88	2	11	87	Hg	0.0100	mg/l	0.0320	mg/l	25	220	-
26	46	2Q88	2	12	87	Hg	0.0100	mg/l	0.0317	mg/l	26	217	-
27	47	2Q88	2	13	87	Hg	0.0100	mg/l	0.0322	mg/l	27	222	-
28	48	2Q88	2	14	87	Hg	0.0100	mg/l	0.0321	mg/l	28	221	-
29	49	2Q88	2	15	87	Hg	0.0100	mg/l	0.0319	mg/l	29	219	-
30	50	2Q88	2	16	87	Hg	0.0100	mg/l	0.0360	mg/l	30	260	-
31	51	2Q88	2	17	87	Hg	0.0100	mg/l	0.0347	mg/l	31	247	-
32	52	2Q88	2	18	87	Hg	0.0100	mg/l	0.0373	mg/l	32	273	-
33	53	2Q88	2	19	87	Hg	0.0100	mg/l	0.0346	mg/l	33	246	-
34	54	2Q88	2	20	87	Hg	0.0100	mg/l	0.0357	mg/l	34	257	-
35	55	2Q88	2	21	87	Hg	0.0100	mg/l	0.0338	mg/l	35	238	-
36	56	2Q88	2	22	87	Hg	0.0100	mg/l	0.0362	mg/l	36	262	-
37	57	2Q88	2	23	87	Hg	0.0100	mg/l	0.0346	mg/l	37	246	-
38	58	2Q88	2	24	87	Hg	0.0100	mg/l	0.0338	mg/l	38	238	-
39	59	2Q88	2	25	87	Hg	0.0100	mg/l	0.0346	mg/l	39	246	-
40	60	2Q88	2	26	87	Hg	0.0100	mg/l	0.0338	mg/l	40	238	-
41	61	2Q88	2	27	87	Hg	0.0100	mg/l	0.0346	mg/l	41	246	-
42	62	2Q88	3	1	87	Hg	0.0100	mg/l	0.0315	mg/l	42	215	-
43	63	2Q88	3	2	87	Hg	0.0100	mg/l	0.0338	mg/l	43	238	-
44	64	2Q88	3	3	87	Hg	0.0100	mg/l	0.0346	mg/l	44	246	-
45	65	2Q88	3	4	87	Hg	0.0100	mg/l	0.0310	mg/l	45	210	-
46	66	2Q88	3	5	87	Hg	0.0100	mg/l	0.0156	mg/l	46	56	-
47	67	2Q88	3	6	87	Hg	0.0100	mg/l	0.0180	mg/l	47	80	-
48	68	2Q88	3	7	87	Hg	0.0100	mg/l	0.0166	mg/l	48	66	-
49	69	2Q88	3	8	87	Hg	0.0100	mg/l	0.0197	mg/l	49	97	-
50	70	2Q88	3	9	87	Hg	0.0100	mg/l	0.0240	mg/l	50	140	-
51	71	2Q88	3	10	87	Hg	0.0100	mg/l	0.0154	mg/l	51	54	-
52	72	2Q88	3	11	87	Hg	0.0100	mg/l	0.0101	mg/l	52	1	-
53	73	2Q88	3	12	87	Hg	0.0100	mg/l	0.0142	mg/l	53	42	-
54	74	2Q88	3	13	87	Hg	0.0100	mg/l	0.0146	mg/l	54	46	-
55	75	2Q88	3	14	87	Hg	0.0100	mg/l	0.0130	mg/l	55	30	-
56	76	2Q88	3	15	87	Hg	0.0100	mg/l	0.0118	mg/l	56	18	-
57	77	2Q88	3	16	87	Hg	0.0100	mg/l	0.0130	mg/l	57	30	-
58	78	2Q88	3	17	87	Hg	0.0100	mg/l	0.0215	mg/l	58	115	-
59	79	2Q88	3	18	87	Hg	0.0100	mg/l	0.0128	mg/l	59	28	-
60	80	2Q88	3	19	87	Hg	0.0100	mg/l	0.0183	mg/l	60	83	-
61	81	2Q88	3	20	87	Hg	0.0100	mg/l	0.0156	mg/l	61	56	-
62	82	2Q88	3	21	87	Hg	0.0100	mg/l	0.0084	mg/l	62	16	-
63	83	2Q88	3	22	87	Hg	0.0100	mg/l	0.0115	mg/l	63	15	-
64	84	2Q88	3	23	87	Hg	0.0100	mg/l	0.0118	mg/l	64	18	-
65	85	2Q88	3	24	87	Hg	0.0100	mg/l	0.0116	mg/l	65	16	-
66	86	2Q88	3	25	87	Hg	0.0100	mg/l	0.0114	mg/l	66	14	-
67	87	2Q88	3	26	87	Hg	0.0100	mg/l	0.0130	mg/l	67	30	-
68	88	2Q88	3	27	87	Hg	0.0100	mg/l	0.0156	mg/l	68	56	-
69	89	3Q88	7	24	87	Hg	0.0100	mg/l	0.0145	mg/l	-	45	-
70	90	3Q88	7	25	87	Hg	0.0100	mg/l	0.0247	mg/l	2	147	-
71	91	3Q88	7	26	87	Hg	0.0100	mg/l	0.0180	mg/l	3	80	-
72	92	3Q88	7	27	87	Hg	0.0100	mg/l	0.0166	mg/l	4	66	-
73	93	3Q88	8	1	87	Hg	0.0100	mg/l	0.0197	mg/l	5	97	-
74	94	3Q88	8	2	87	Hg	0.0100	mg/l	0.0240	mg/l	6	140	-
75	95	3Q88	8	3	87	Hg	0.0100	mg/l	0.0154	mg/l	7	54	-
76	96	3Q88	8	4	87	Hg	0.0100	mg/l	0.0101	mg/l	8	1	-
77	97	3Q88	8	5	87	Hg	0.0100	mg/l	0.0142	mg/l	9	42	-
78	98	3Q88	8	6	87	Hg	0.0100	mg/l	0.0146	mg/l	10	46	-
79	99	3Q88	8	7	87	Hg	0.0100	mg/l	0.0130	mg/l	11	30	-
80	100	3Q88	8	8	87	Hg	0.0100	mg/l	0.0118	mg/l	12	18	-
81	101	3Q88	8	9	87	Hg	0.0100	mg/l	0.0130	mg/l	13	30	-
82	102	3Q88	8	10	87	Hg	0.0100	mg/l	0.0215	mg/l	14	115	-
83	103	3Q88	8	11	87	Hg	0.0100	mg/l	0.0128	mg/l	15	28	-
84	104	3Q88	8	12	87	Hg	0.0100	mg/l	0.0183	mg/l	16	83	-
85	105	3Q88	8	13	87	Hg	0.0100	mg/l	0.0156	mg/l	17	56	-
86	106	3Q88	8	14	87	Hg	0.0100	mg/l	0.0084	mg/l	18	16	-
87	107	3Q88	8	15	87	Hg	0.0100	mg/l	0.0115	mg/l	19	15	-
88	108	3Q88	8	16	87	Hg	0.0100	mg/l	0.0118	mg/l	20	18	-
89	109	3Q88	8	17	87	Hg	0.0100	mg/l	0.0116	mg/l	21	16	-
90	110	3Q88	8	18	87	Hg	0.0100	mg/l	0.0114	mg/l	22	14	-
91	111	3Q88	8	19	87	Hg	0.0100	mg/l	0.0130	mg/l	23	30	-
92	112	3Q88	8	20	87	Hg	0.0100	mg/l	0.0156	mg/l	24	56	-
93	113	3Q88	8	21	87	Hg	0.0100	mg/l	0.0145	mg/l	25	45	-
94	114	3Q88	8	22	87	Hg	0.0100	mg/l	0.0156	mg/l	26	56	-

CHRONOLOGICAL LIST OF DEFENDANT'S OUTFALL 001 DISCHARGE VIOLATIONS

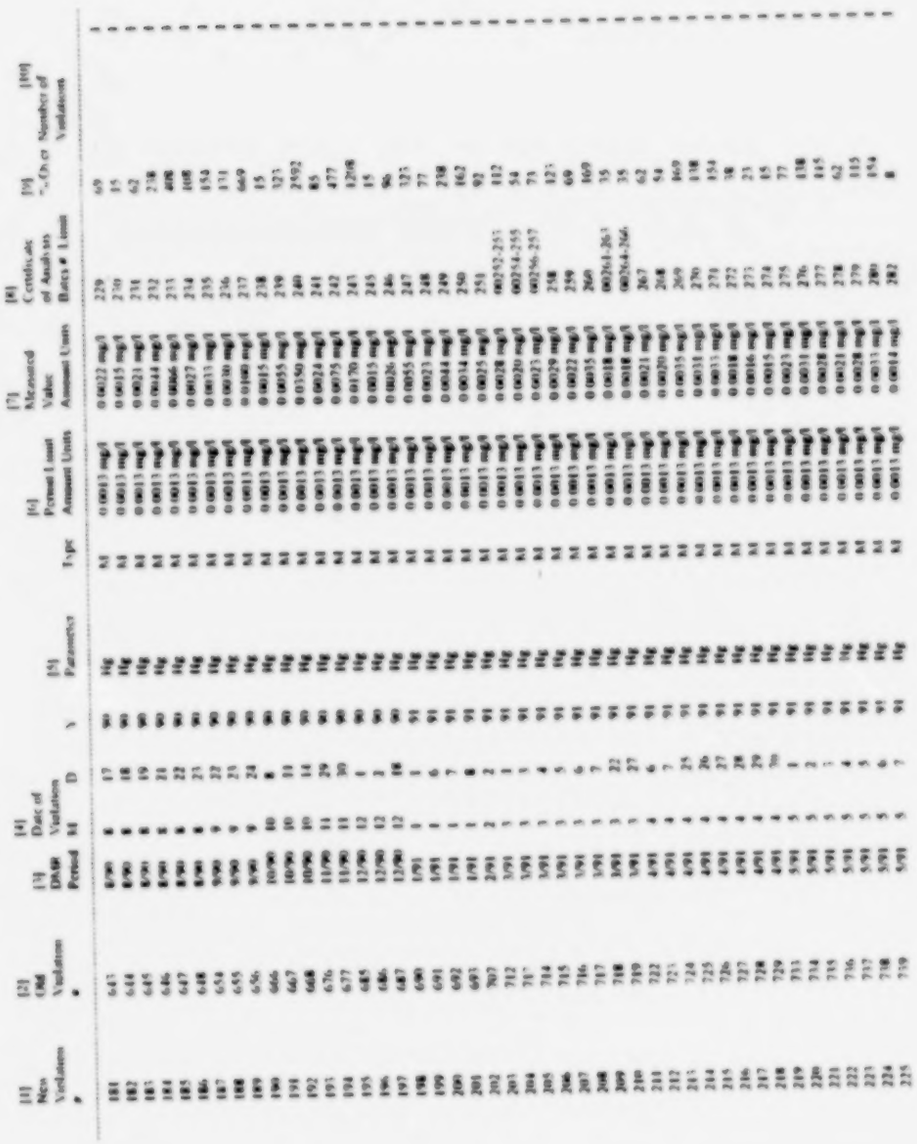
[1] Type	[2] Permit Limit Amount Units	[3] Measured Value Amount Units	[4] Certificate of Analysis Date # 1	[5] C. Or	[6] Number of Violations
A2	0.0015 mg/l	0.0018 mg/l	4	427	
A2	0.0015 mg/l	0.0015 mg/l	48	15	
A2	0.0015 mg/l	0.0050 mg/l	49	285	
A2	0.0015 mg/l	0.0022 mg/l	50	10	
A2	0.0015 mg/l	0.0020 mg/l	51	208	
A2	0.0015 mg/l	0.0041 mg/l	52	215	
A2	0.0015 mg/l	0.0053 mg/l	53	208	
A2	0.0015 mg/l	0.0040 mg/l	54	208	
A2	0.0015 mg/l	0.0019 mg/l	55	46	
A2	0.0015 mg/l	0.0018 mg/l	56	46	
A2	0.0015 mg/l	0.0019 mg/l	57	46	
A2	0.0015 mg/l	0.0150 mg/l	58	1054	
A2	0.0015 mg/l	0.0150 mg/l	59	1054	
A2	0.0015 mg/l	0.0041 mg/l	60	215	
A2	0.0015 mg/l	0.0014 mg/l	61	4	
A2	0.0015 mg/l	0.0019 mg/l	62	40	
A2	0.0015 mg/l	0.0060 mg/l	63	362	
A2	0.0015 mg/l	0.0071 mg/l	64	362	
A2	0.0015 mg/l	0.0025 mg/l	65	92	
A2	0.0015 mg/l	0.0036 mg/l	66	215	
A2	0.0015 mg/l	0.0050 mg/l	67	285	
A2	0.0015 mg/l	0.0075 mg/l	68	477	
A2	0.0015 mg/l	0.0036 mg/l	69	208	
A2	0.0015 mg/l	0.0080 mg/l	70	208	
A2	0.0015 mg/l	0.0079 mg/l	71	123	
A2	0.0015 mg/l	0.0017 mg/l	72	123	
A2	0.0015 mg/l	0.0026 mg/l	73	160	
A2	0.0015 mg/l	0.0027 mg/l	74	208	
A2	0.0015 mg/l	0.0074 mg/l	75	83	
A2	0.0015 mg/l	0.0018 mg/l	76	98	
A2	0.0015 mg/l	0.0060 mg/l	77	362	
A2	0.0015 mg/l	0.0165 mg/l	78	1869	
A2	0.0015 mg/l	0.0072 mg/l	79	454	
A2	0.0015 mg/l	0.0025 mg/l	80	92	
A2	0.0015 mg/l	0.0079 mg/l	81	123	
A2	0.0015 mg/l	0.0015 mg/l	82	15	
A2	0.0015 mg/l	0.0026 mg/l	83	160	
A2	0.0015 mg/l	0.0040 mg/l	84	208	
A2	0.0015 mg/l	0.0014 mg/l	85	15	
A2	0.0015 mg/l	0.0024 mg/l	86	208	
A2	0.0015 mg/l	0.0038 mg/l	87	192	
A2	0.0015 mg/l	0.0022 mg/l	88	208	

[1] Type	[2] Permit Limit Amount Units	[3] Measured Value Amount Units	[4] Certificate of Analysis Date # 1	[5] C. Or	[6] Number of Violations
A2	0.0015 mg/l	0.0016 mg/l	104	177	
A2	0.0015 mg/l	0.0030 mg/l	105	111	
A2	0.0015 mg/l	0.0070 mg/l	106	438	
A2	0.0015 mg/l	0.0020 mg/l	108	9	
A2	0.0015 mg/l	0.0022 mg/l	115	9	
A2	0.0015 mg/l	0.0020 mg/l	116	208	
A2	0.0015 mg/l	0.0040 mg/l	117	9	
A2	0.0015 mg/l	0.0020 mg/l	118	208	
A2	0.0015 mg/l	0.0040 mg/l	119	62	
A2	0.0015 mg/l	0.0021 mg/l	121	192	
A2	0.0015 mg/l	0.0018 mg/l	127	15	
A2	0.0015 mg/l	0.0015 mg/l	130	208	
A2	0.0015 mg/l	0.0040 mg/l	131	118	
A2	0.0015 mg/l	0.0028 mg/l	132	9	
A2	0.0015 mg/l	0.0020 mg/l	133	208	
A2	0.0015 mg/l	0.0040 mg/l	134	9	
A2	0.0015 mg/l	0.0020 mg/l	135	46	
A2	0.0015 mg/l	0.0032 mg/l	136	208	
A2	0.0015 mg/l	0.0049 mg/l	137	277	
A2	0.0015 mg/l	0.0049 mg/l	138	208	
A2	0.0015 mg/l	0.0031 mg/l	139	154	
A2	0.0015 mg/l	0.0021 mg/l	140	62	
A2	0.0015 mg/l	0.0021 mg/l	141	62	
A2	0.0015 mg/l	0.0014 mg/l	142	9	
A2	0.0015 mg/l	0.0018 mg/l	148	9	
A2	0.0015 mg/l	0.0017 mg/l	149	9	
A2	0.0015 mg/l	0.0020 mg/l	150	9	
A2	0.0015 mg/l	0.0018 mg/l	151	9	
A2	0.0015 mg/l	0.0027 mg/l	154	9	
A2	0.0015 mg/l	0.0050 mg/l	155	285	
A2	0.0015 mg/l	0.0040 mg/l	156	208	
A2	0.0015 mg/l	0.0300 mg/l	157	1438	
A2	0.0015 mg/l	0.0014 mg/l	158	9	
A2	0.0015 mg/l	0.0024 mg/l	159	85	
A2	0.0015 mg/l	0.0023 mg/l	160	77	
A2	0.0015 mg/l	0.0015 mg/l	161	15	
A2	0.0015 mg/l	0.0022 mg/l	162	169	
A2	0.0015 mg/l	0.0055 mg/l	166	325	
A2	0.0015 mg/l	0.0050 mg/l	167	285	
A2	0.0015 mg/l	0.0021 mg/l	168	77	
A2	0.0015 mg/l	0.0058 mg/l	170	346	
A2	0.0015 mg/l	0.0027 mg/l	172	108	

CHRONOLOGICAL LIST OF DEFENDANT'S OUTFALL 001 DISCHARGE VIOLATIONS



CHRONOLOGICAL LIST OF DEFENDANT'S OUTFALL 001 DISCHARGE VIOLATIONS



[1] New Violation #	[2] Old Violation #	[3] DMR Period	[4] Date of Violation M	D	Y	[5] Parameter	Type	[6] Permit Limit Amount Units	[7] Measured Value Amount Units	[8] Certificate of Analysis Rates #	[9] % Over Limit	[10] Number of Violations
226	749	5/91	5	8	91	Hg	M	0.0013 mg/l	0.0018 mg/l	283	38	1
227	748	5/91	5	9	91	Hg	M	0.0013 mg/l	0.0058 mg/l	284	346	1
228	742	5/91	5	11	91	Hg	M	0.0013 mg/l	0.0017 mg/l	285	31	1
229	743	5/91	5	12	91	Hg	M	0.0013 mg/l	0.0022 mg/l	286	69	1
230	744	5/91	5	13	91	Hg	M	0.0013 mg/l	0.0033 mg/l	287	154	1
231	745	5/91	5	14	91	Hg	M	0.0013 mg/l	0.0016 mg/l	288	23	1
232	746	5/91	5	19	91	Hg	M	0.0013 mg/l	0.0083 mg/l	290	538	1
233	747	5/91	5	20	91	Hg	M	0.0013 mg/l	0.0014 mg/l	291	8	1
234	748	5/91	5	21	91	Hg	M	0.0013 mg/l	0.0019 mg/l	292	46	1
235	749	5/91	5	22	91	Hg	M	0.0013 mg/l	0.0034 mg/l	293	162	1
236	750	5/91	5	23	91	Hg	M	0.0013 mg/l	0.0027 mg/l	294	108	1
237	751	5/91	5	24	91	Hg	M	0.0013 mg/l	0.0040 mg/l	295	208	1
238	752	5/91	5	25	91	Hg	M	0.0013 mg/l	0.0037 mg/l	296	185	1
239	753	5/91	5	26	91	Hg	M	0.0013 mg/l	0.0044 mg/l	297	238	1
240	754	5/91	5	27	91	Hg	M	0.0013 mg/l	0.0040 mg/l	298	208	1
241	755	5/91	5	28	91	Hg	M	0.0013 mg/l	0.0041 mg/l	299	215	1
242	756	5/91	5	29	91	Hg	M	0.0013 mg/l	0.0038 mg/l	300	192	1
243	757	5/91	5	30	91	Hg	M	0.0013 mg/l	0.0047 mg/l	301	31	1
244	758	5/91	5	31	91	Hg	M	0.0013 mg/l	0.0020 mg/l	302	54	1
245	761	6/91	6	1	91	Hg	M	0.0013 mg/l	0.0043 mg/l	303	231	1
246	762	6/91	6	2	91	Hg	M	0.0013 mg/l	0.0076 mg/l	304	485	1
247	763	6/91	6	3	91	Hg	M	0.0013 mg/l	0.0063 mg/l	305	385	1
248	764	6/91	6	5	91	Hg	M	0.0013 mg/l	0.0092 mg/l	306	608	1
249	765	6/91	6	6	91	Hg	M	0.0013 mg/l	0.0051 mg/l	307	292	1
250	766	6/91	6	7	91	Hg	M	0.0013 mg/l	0.0038 mg/l	308	192	1
251	767	6/91	6	8	91	Hg	M	0.0013 mg/l	0.0014 mg/l	309	8	1
252	768	6/91	6	9	91	Hg	M	0.0013 mg/l	0.0017 mg/l	310	31	1
253	769	6/91	6	10	91	Hg	M	0.0013 mg/l	0.0025 mg/l	312	92	1
254	770	6/91	6	12	91	Hg	M	0.0013 mg/l	0.0036 mg/l	313	177	1
255	771	6/91	6	13	91	Hg	M	0.0013 mg/l	0.0032 mg/l	314	146	1
256	772	6/91	6	15	91	Hg	M	0.0013 mg/l	0.0017 mg/l	317	31	1
257	773	6/91	6	16	91	Hg	M	0.0013 mg/l	0.0015 mg/l	319	15	1
258	774	6/91	6	17	91	Hg	M	0.0013 mg/l	0.0016 mg/l	320	23	1
259	775	6/91	6	18	91	Hg	M	0.0013 mg/l	0.0020 mg/l	321	54	1
260	776	6/91	6	19	91	Hg	M	0.0013 mg/l	0.0017 mg/l	322	31	1
261	777	6/91	6	20	91	Hg	M	0.0013 mg/l	0.0014 mg/l	323	8	1
262	778	6/91	6	23	91	Hg	M	0.0013 mg/l	0.0015 mg/l	324	15	1
263	779	6/91	6	24	91	Hg	M	0.0013 mg/l	0.0046 mg/l	326	254	1
264	780	6/91	6	25	91	Hg	M	0.0013 mg/l	0.0018 mg/l	327	38	1
265	781	6/91	6	28	91	Hg	M	0.0013 mg/l	0.0014 mg/l	328	8	1
266	784	7/91	7	4	91	Hg	M	0.0013 mg/l	0.0016 mg/l	329	23	1
267	785	7/91	7	5	91	Hg	M	0.0013 mg/l	0.0027 mg/l	330	108	1
268	786	7/91	7	6	91	Hg	M	0.0013 mg/l	0.0119 mg/l	331	815	1
269	787	7/91	7	7	91	Hg	M	0.0013 mg/l	0.0176 mg/l	332	1254	1
270	788	7/91	7	8	91	Hg	M	0.0013 mg/l	0.0100 mg/l	60333-334	669	1

[1] New Violation #	[2] Old Violation #	[3] DMR Period	[4] Date of Violation M	D	Y	[5] Parameter	Type	[6] Permit Limit Amount Units	[7] Measured Value Amount Units	[8] Certificate of Analysis Rates #	[9] % Over Limit	[10] Number of Violations
271	789	7/91	7	9	91	Hg	M	0.0013 mg/l	0.0021 mg/l	335	62	1
272	790	7/91	7	10	91	Hg	M	0.0013 mg/l	0.0035 mg/l	336	169	1
273	791	7/91	7	11	91	Hg	M	0.0013 mg/l	0.0082 mg/l	337	531	1
274	792	7/91	7	12	91	Hg	M	0.0013 mg/l	0.0025 mg/l	338	92	1
275	793	7/91	7	13	91	Hg	M	0.0013 mg/l	0.0038 mg/l	339	192	1
276	794	7/91	7	14	91	Hg	M	0.0013 mg/l	0.0014 mg/l	340	8	1
277	795	7/91	7	19	91	Hg	M	0.0013 mg/l	0.0020 mg/l	341	54	1
278	796	7/91	7	21	91	Hg	M	0.0013 mg/l	0.0031 mg/l	342	138	1
279	797	7/91	7	22	91	Hg	M	0.0013 mg/l	0.0029 mg/l	343	123	1
280	800	8/91	8	10	91	Hg	M	0.0013 mg/l	0.0014 mg/l	344	8	1
281	801	8/91	8	15	91	Hg	M	0.0013 mg/l	0.0016 mg/l	345	23	1
282	802	8/91	8	17	91	Hg	M	0.0013 mg/l	0.0020 mg/l	346	54	1
283	803	8/91	8	23	91	Hg	M	0.0013 mg/l	0.0019 mg/l	347	46	1
284	804	8/91	8	27	91	Hg	M	0.0013 mg/l	0.0015 mg/l	348	15	1
285	805	8/91	8	29	91	Hg	M	0.0013 mg/l	0.0022 mg/l	349	69	1
286	810	9/91	9	13	91	Hg	M	0.0013 mg/l	0.0018 mg/l	350	38	1
287	811	9/91	9	14	91	Hg	M	0.0013 mg/l	0.0015 mg/l	351	15	1
288	812	9/91	9	15	91	Hg	M	0.0013 mg/l	0.0018 mg/l	352	38	1
289	813	9/91	9	16	91	Hg	M	0.0013 mg/l	0.0023 mg/l	353	77	1
290	814	9/91	9	17	91	Hg	M	0.0013 mg/l	0.0028 mg/l	354	115	1
291	815	9/91	9	18	91	Hg	M	0.0013 mg/l	0.0018 mg/l	355	38	1
292	816	9/91	9	19	91	Hg	M	0.0013 mg/l	0.0015 mg/l	356	15	1
293	817	9/91	9	20	91	Hg	M	0.0013 mg/l	0.0015 mg/l	357	15	1
294	818	9/91	9	22	91	H_g	M	0.0013 mg/l	0.0024 mg/l	358	85	1
295	819	9/91	9	23	91	Hg	M	0.0013 mg/l	0.0028 mg/l	359	115	1
296	820	9/91	9	24	91	Hg	M	0.0013 mg/l	0.0037 mg/l	360	185	1
297	821	9/91	9	25	91	Hg	M	0.0013 mg/l	0.0029 mg/l	361	123	1
298	822	9/91	9	26	91	Hg	M	0.0013 mg/l	0.0023 mg/l	362	77	1
299	823	9/91	9	29	91	Hg	M	0.0013 mg/l	0.0022 mg/l	363	69	1
300	824	9/91	9	30	91	Hg	M	0.0013 mg/l	0.0018 mg/l	364	38	1
301	827	10/91	10	1	91	Hg	M	0.0013 mg/l	0.0014 mg/l	365	8	1
302	828	10/91	10	4	91	Hg	M	0.0013 mg/l	0.0022 mg/l	366	69	1
303	829	10/91	10	5	91	Hg	M	0.0013 mg/l	0.0015 mg/l	367	15	1
304	830	10/91	10	7	91	Hg	M	0.0013 mg/l	0.0020 mg/l	368	54	1
305	831	10/91	10	8	91	Hg	M	0.0013 mg/l	0.0024 mg/l	369	85	1
306	832	10/91	10	10	91	Hg	M	0.0013 mg/l	0.0019 mg/l	370	46	1
307	833	10/91	10	11	91	Hg	M	0.0013 mg/l	0.0017 mg/l	371	31	1
308	834	10/91	10	12	91	Hg	M	0.0013 mg/l	0.0020 mg/l	372	54	1
309	835	10/91	10	13	91	Hg	M	0.0013 mg/l	0.0022 mg/l	373	69	1
310	836	10/91	10	14	91	Hg	M	0.0013 mg/l	0.0014 mg/l	374	8	1
311	837	10/91	10	15	91	Hg	M	0.0013 mg/l	0.0017 mg/l	375	31	1
312	838	10/91	10	16	91	Hg	M	0.0013 mg/l	0.0041 mg/l	376	215	1
313	839	10/91	10	17	91	Hg	M	0.0013 mg/l	0.0103 mg/l	377	692	1
314	840	10/91	10	18	91	Hg	M	0.0013 mg/l	0.0024 mg/l	378	85	1
315	841	10/91	10	19	91	Hg	M	0.0013 mg/l	0.0065 mg/l	379	400	1

FRIENDS OF THE EARTH v. LAIDLAW ENVIRONMENTAL SERVICES (TOC)
D.S.C. Civ. No. 1:92-1697-17

CHRONOLOGICAL LIST OF DEFENDANT'S OUTFALL 001 DISCHARGE VIOLATIONS

[1] Non Violation #	[2] Old Violation #	[3] DMR Period	[4] Date of Violation Mo	Da	Yr	[5] Parameter	Page	[6] Permit Limit Amount Units	[7] Measured Value Amount Units	[8] Certificate of Analysis Rules # Limit	[9] % Over	[10] Number of Violations
146	142	10/91	10	30	92	00400	1	6.0 SU	5.4 SU	180	85	
147	143	10/91	10	31	92	00400	1	6.0 SU	5.4 SU	180	85	
148	144	10/91	11	1	92	00400	1	6.0 SU	5.4 SU	182	182	
149	145	10/91	11	2	92	00400	1	6.0 SU	5.4 SU	182	217	
150	146	10/91	11	3	92	00400	1	6.0 SU	5.4 SU	183	208	
151	147	10/91	11	4	92	00400	1	6.0 SU	5.4 SU	184	215	
152	148	10/91	11	5	92	00400	1	6.0 SU	5.4 SU	185	215	
153	149	10/91	11	6	92	00400	1	6.0 SU	5.4 SU	186	77	
154	150	10/91	11	7	92	00400	1	6.0 SU	5.4 SU	187	77	
155	151	10/91	11	8	92	00400	1	6.0 SU	5.4 SU	188	115	
156	152	10/91	11	9	92	00400	1	6.0 SU	5.4 SU	189	265	
157	153	10/91	11	10	92	00400	1	6.0 SU	5.4 SU	190	34	
158	154	10/91	11	11	92	00400	1	6.0 SU	5.4 SU	191	162	
159	155	10/91	11	12	92	00400	1	6.0 SU	5.4 SU	192	154	
160	156	10/91	11	13	92	00400	1	6.0 SU	5.4 SU	193	169	
161	157	10/91	11	14	92	00400	1	6.0 SU	5.4 SU	194	77	
162	158	10/91	11	15	92	00400	1	6.0 SU	5.4 SU	195	231	
163	159	10/91	11	16	92	00400	1	6.0 SU	5.4 SU	196	231	
164	160	10/91	11	17	92	00400	1	6.0 SU	5.4 SU	197	208	
165	161	10/91	11	18	92	00400	1	6.0 SU	5.4 SU	198	46	
166	162	10/91	11	19	92	00400	1	6.0 SU	5.4 SU	199	185	
167	163	10/91	11	20	92	00400	1	6.0 SU	5.4 SU	200	185	
168	164	10/91	11	21	92	00400	1	6.0 SU	5.4 SU	201	154	
169	165	10/91	11	22	92	00400	1	6.0 SU	5.4 SU	202	308	
170	166	10/91	11	23	92	00400	1	6.0 SU	5.4 SU	203	231	
171	167	10/91	11	24	92	00400	1	6.0 SU	5.4 SU	204	231	
172	168	10/91	11	25	92	00400	1	6.0 SU	5.4 SU	205	231	
173	169	10/91	11	26	92	00400	1	6.0 SU	5.4 SU	206	231	
174	170	10/91	11	27	92	00400	1	6.0 SU	5.4 SU	207	231	
175	171	10/91	11	28	92	00400	1	6.0 SU	5.4 SU	208	231	
176	172	10/91	11	29	92	00400	1	6.0 SU	5.4 SU	209	231	
177	173	10/91	11	30	92	00400	1	6.0 SU	5.4 SU	210	231	
178	174	10/91	12	1	92	00400	1	6.0 SU	5.4 SU	211	231	
179	175	10/91	12	2	92	00400	1	6.0 SU	5.4 SU	212	231	
180	176	10/91	12	3	92	00400	1	6.0 SU	5.4 SU	213	231	
181	177	10/91	12	4	92	00400	1	6.0 SU	5.4 SU	214	231	
182	178	10/91	12	5	92	00400	1	6.0 SU	5.4 SU	215	231	
183	179	10/91	12	6	92	00400	1	6.0 SU	5.4 SU	216	231	
184	180	10/91	12	7	92	00400	1	6.0 SU	5.4 SU	217	231	
185	181	10/91	12	8	92	00400	1	6.0 SU	5.4 SU	218	231	
186	182	10/91	12	9	92	00400	1	6.0 SU	5.4 SU	219	231	
187	183	10/91	12	10	92	00400	1	6.0 SU	5.4 SU	220	231	
188	184	10/91	12	11	92	00400	1	6.0 SU	5.4 SU	221	231	
189	185	10/91	12	12	92	00400	1	6.0 SU	5.4 SU	222	231	
190	186	10/91	12	13	92	00400	1	6.0 SU	5.4 SU	223	231	
191	187	10/91	12	14	92	00400	1	6.0 SU	5.4 SU	224	231	
192	188	10/91	12	15	92	00400	1	6.0 SU	5.4 SU	225	231	
193	189	10/91	12	16	92	00400	1	6.0 SU	5.4 SU	226	231	
194	190	10/91	12	17	92	00400	1	6.0 SU	5.4 SU	227	231	
195	191	10/91	12	18	92	00400	1	6.0 SU	5.4 SU	228	231	
196	192	10/91	12	19	92	00400	1	6.0 SU	5.4 SU	229	231	
197	193	10/91	12	20	92	00400	1	6.0 SU	5.4 SU	230	231	
198	194	10/91	12	21	92	00400	1	6.0 SU	5.4 SU	231	231	
199	195	10/91	12	22	92	00400	1	6.0 SU	5.4 SU	232	231	
200	196	10/91	12	23	92	00400	1	6.0 SU	5.4 SU	233	231	
201	197	10/91	12	24	92	00400	1	6.0 SU	5.4 SU	234	231	
202	198	10/91	12	25	92	00400	1	6.0 SU	5.4 SU	235	231	
203	199	10/91	12	26	92	00400	1	6.0 SU	5.4 SU	236	231	
204	200	10/91	12	27	92	00400	1	6.0 SU	5.4 SU	237	231	
205	201	10/91	12	28	92	00400	1	6.0 SU	5.4 SU	238	231	
206	202	10/91	12	29	92	00400	1	6.0 SU	5.4 SU	239	231	
207	203	10/91	12	30	92	00400	1	6.0 SU	5.4 SU	240	231	
208	204	10/91	12	31	92	00400	1	6.0 SU	5.4 SU	241	231	
209	205	11/91	1	1	93	00400	1	6.0 SU	5.4 SU	242	231	
210	206	11/91	1	2	93	00400	1	6.0 SU	5.4 SU	243	231	
211	207	11/91	1	3	93	00400	1	6.0 SU	5.4 SU	244	231	
212	208	11/91	1	4	93	00400	1	6.0 SU	5.4 SU	245	231	
213	209	11/91	1	5	93	00400	1	6.0 SU	5.4 SU	246	231	
214	210	11/91	1	6	93	00400	1	6.0 SU	5.4 SU	247	231	
215	211	11/91	1	7	93	00400	1	6.0 SU	5.4 SU	248	231	
216	212	11/91	1	8	93	00400	1	6.0 SU	5.4 SU	249	231	
217	213	11/91	1	9	93	00400	1	6.0 SU	5.4 SU	250	231	
218	214	11/91	1	10	93	00400	1	6.0 SU	5.4 SU	251	231	
219	215	11/91	1	11	93	00400	1	6.0 SU	5.4 SU	252	231	
220	216	11/91	1	12	93	00400	1	6.0 SU	5.4 SU	253	231	

FRIENDS OF THE EARTH v. LAIDLAW ENVIRONMENTAL SERVICES (TOC)
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CHRONOLOGICAL LIST OF DEFENDANT'S OUTFALL 001 DISCHARGE VIOLATIONS

[1] Non Violation #	[2] Old Violation #	[3] DMR Period	[4] Date of Violation Mo	Da	Yr	[5] Parameter	Page	[6] Permit Limit Amount Units	[7] Measured Value Amount Units	[8] Certificate of Analysis Rules # Limit	[9] % Over	[10] Number of Violations
221	217	11/91	1	13	93	00400	1	6.0 SU	5.4 SU	254	231	
222	218	11/91	1	14	93	00400	1	6.0 SU	5.4 SU	255	231	
223	219	11/91	1	15	93	00400	1	6.0 SU	5.4 SU	256	231	
224	220	11/91	1	16	93	00400	1	6.0 SU	5.4 SU	257	231	
225	221	11/91	1	17	93	00400	1	6.0 SU	5.4 SU	258	231	
226	222	11/91	1	18	93	00400	1	6.0 SU	5.4 SU	259	231	
227	223	11/91	1	19	93	00400	1	6.0 SU	5.4 SU	260	231	
228	224	11/91	1	20	93	00400	1	6.0 SU	5.4 SU	261	231	
229	225	11/91	1	21	93	00400	1	6.0 SU	5.4 SU	262	231	
230	226	11/91	1	22	93	00400	1	6.0 SU	5.4 SU	263	231	
231	227	11/91	1	23	93	00400	1	6.0 SU	5.4 SU	264	231	
232	228	11/91	1	24	93	00400	1	6.0 SU	5.4 SU	265	231	
233	229	11/91	1	25	93	00400	1	6.0 SU	5.4 SU	266	231	
234	230	11/91	1	26	93	00400	1	6.0 SU	5.4 SU	267	231	
235	231	11/91	1	27	93	00400	1	6.0 SU	5.4 SU	268	231	
236	232	11/91	1	28	93	00400	1	6.0 SU	5.4 SU	269	231	
237	233	11/91	1	29	93	00400	1	6.0 SU	5.4 SU	270	231	
238	234	11/91	1	30	93	00400	1	6.0 SU	5.4 SU	271	231	
239	235	11/91	1	31	93	00400	1	6.0 SU	5.4 SU	272	231	
240	236	11/91	2	1	93	00400	1	6.0 SU	5.4 SU	273	231	
241	237	11/91	2	2	93	00400	1	6.0 SU	5.4 SU	274	231	
242	238	11/91	2	3	93	00400	1	6.0 SU	5.4 SU	275	231	
243	239	11/91	2	4	93	00400	1	6.0 SU	5.4 SU	276	231	
244	240	11/91	2	5	93	00400	1	6.0 SU	5.4 SU	277	231	
245	241	11/91	2	6	93	00400	1	6.0 SU	5.4 SU	278	231	
246	242	11/91	2	7	93	00400	1	6.0 SU	5.4 SU	279	231	
247	243	11/91	2	8	93	00400	1	6.0 SU	5.4 SU	280	231	
248	244	11/91	2	9	93	00400	1	6.0 SU	5.4 SU	281	231	
249	245	11/91	2	10	93	00400	1	6.0 SU	5.4 SU	282	231	
250	246	11/91	2	11	93	00400	1	6.0 SU	5.4 SU	283	231	
251	247	11/91	2	12	93	00400	1	6.0 SU	5.4 SU	284	231	
252	248	11/91	2	13	93	00400	1	6.0 SU	5.4 SU	285	231	
253	249	11/91	2	14	93	00400	1	6.0 SU	5.4 SU	286	231	
254	250	11/91	2	15	93	00400	1	6.0 SU	5.4 SU	287	231	
255	251	11/91	2	16	93	00400	1	6.0 SU	5.4 SU	288	231	
256	252	11/91	2	17	93	00400	1	6.0 SU	5.4 SU	289	231	
257	253	11/91	2	18	93	00400	1	6.0 SU	5.4 SU	290	231	
258	254	11/91	2	19	93	00400	1	6.0 SU	5.4 SU	291	231	
259	255	11/91	2	20	93	00400	1	6.0 SU	5.4 SU	292	231	
260	256	11/91	2	21	93	00400	1	6.0 SU	5.4 SU	293	231	
261	257	11/91	2	22	93	00400	1	6.0 SU	5.4 SU	294	231	
262	258	11/91	2	23	93	00400	1	6.0 SU	5.4 SU	295	231	
263	259	11/91	2	24	93	00400	1	6.0 SU	5.4 SU	296	231	
264	260	11/91	2	25	93	00400	1	6.0 SU	5.4 SU	297	231	
265	261	11/91	2	26	93	00400	1	6.0 SU	5.4 SU	298	231	
266	262	11/91	2	27	93	00400	1	6.0 SU	5.4 SU	299	231	
267	263	11/91	2	28	93	00400	1	6.0 SU	5.4 SU	300	231	
268	264	11/91	3	1	93	00400	1	6.0 SU	5.4 SU	301	231	
269	265	11/91	3	2	93	00400	1	6.0 SU	5.4 SU	302	231	
270	266	11/91	3	3	93	00400	1	6.0 SU	5.4 SU	303	231	
271	267	11/91	3	4	93	00400	1	6.0 SU	5.4 SU	304	231	
272	268	11/91	3	5	93	00400	1	6.0 SU	5.4 SU	305	231	
273	269	11/91	3	6	93	00400	1	6.0 SU	5.4 SU	306	231	
274	270	11/91	3	7	93	00400	1	6.0 SU	5.4 SU	307	231	
275	271	11/91	3	8	93	00400	1	6.0 SU	5.4 SU	308	231	
276	272	11/91	3	9	93	00400	1	6.0 SU	5.4 SU	309	231	
277	273	11/91	3	10	93	00400	1	6.0 SU	5.4 SU	310	231	
278	274	11/91	3	11	93	00400	1	6.0 SU	5.4 SU	311	231	
279	275	11/91	3	12	93	00400	1	6.0 SU	5.4 SU	312	231	
280	276	11/91	3	13	93	00400	1	6.0 SU	5.4 SU	313	231	
281	277	11/91	3	14	93	00400	1	6.0 SU	5.4 SU	314	231	
282	278	11/91	3	15	93	00400	1	6.0 SU	5.4 SU	315	231	
283	279	11/91	3	16	93	00400	1	6.0 SU	5.4 SU	316	231	
284	280	11/91	3	17	93	00400	1	6.0 SU	5.4 SU	317	231	
285	281	11/91	3	18	93	00400	1	6.0 SU	5.4 SU	318	231	
286	282	11/91	3	19	93	00400	1	6.0 SU	5.4 SU	319	231	
287	283	11/91	3	20	93	00400	1	6.0 SU	5.4 SU	320	231	
288	284	11/91	3	21	93	00400	1	6.0 SU	5.4 SU	321	231	
289	285	11/91	3	22	93	00400	1	6.0 SU	5.4 SU	322	231	
290	286	11/91	3	23	93	00400	1	6.0 SU	5.4 SU	323	231	
291	287	11/91	3	24	93	00400	1	6.0 SU	5.4 SU	324	231	
292	288	11/91	3	25	93	00400	1	6.0 SU	5.4 SU	325	231	
293	289	11/91	3	26	93	00400	1	6.0 SU	5.4 SU	326	231	
294	290	11/91	3	27	93	00400	1	6.0 SU	5.4 SU	327	231	
295	291	11/91	3	28	93	00400	1	6.0 SU	5.4 SU	328	231	
296	292	11/91	3	29	93	00400	1	6.0 SU	5.4 SU	329	231	
297	293	11/91	3	30	93	00400	1	6.0 SU	5.4 SU	330	231	
298	294	11/91	3	31	93	00400	1	6.0 SU	5.4 SU	331	231	
299	295	11/91	4	1	93	00400	1	6.0 SU	5.4 SU	332	231	
300	296	11/91	4	2	93	00400	1	6.0 SU	5.4 SU	333	231	

FRIENDS OF THE EARTH v. LAIDLAW ENVIRONMENTAL SERVICES (TOC)
D.S.C. Civ. No. 3:92-1697-17

CHRONOLOGICAL LIST OF DEFENDANT'S OUTFALL 001 DISCHARGE VIOLATIONS

[1] Rec. Violation #	[2] Old Violation #	[3] DMR Period	[4] Date of Violation M	D	Y	[5] Parameter	Type	[6] Percent Limit Amount Units	[7] Measured Value Amount Units	[8] Certificate of Analysis Rdcv # Limit	[9] % Over Limit	[10] Number of Violations
486	942	592	1	30	92	50	A2	0.0001 mg/l	0.0067 mg/l	470	415	
487	943	592	1	31	92	51	A2	0.0001 mg/l	0.0043 mg/l	471	315	
488	944	592	2	1	92	52	A2	0.0001 mg/l	0.0059 mg/l	472	315	
489	945	592	2	2	92	53	A2	0.0001 mg/l	0.0074 mg/l	473	85	
490	946	592	2	3	92	54	A2	0.0001 mg/l	0.0055 mg/l	474	575	
491	947	592	2	4	92	55	A2	0.0001 mg/l	0.0014 mg/l	475	862	
492	948	592	2	5	92	56	A2	0.0001 mg/l	0.0015 mg/l	476	15	
493	949	592	2	6	92	57	A2	0.0001 mg/l	0.0029 mg/l	477	9	
494	950	592	2	7	92	58	A2	0.0001 mg/l	0.0026 mg/l	478	17	
495	951	592	2	8	92	59	A2	0.0001 mg/l	0.0024 mg/l	479	85	
496	952	592	2	9	92	60	A2	0.0001 mg/l	0.0014 mg/l	480	862	
497	953	592	2	10	92	61	A2	0.0001 mg/l	0.0025 mg/l	481	92	
498	954	592	2	11	92	62	A2	0.0001 mg/l	0.0041 mg/l	482	215	
499	955	592	2	12	92	63	A2	0.0001 mg/l	0.0011 mg/l	483	138	
500	956	592	2	13	92	64	A2	0.0001 mg/l	0.0018 mg/l	484	38	
501	957	592	2	14	92	65	A2	0.0001 mg/l	0.0030 mg/l	485	131	
502	958	592	2	15	92	66	A2	0.0001 mg/l	0.0030 mg/l	486	131	
503	959	592	2	16	92	67	A2	0.0001 mg/l	0.0028 mg/l	487	115	
504	960	592	2	17	92	68	A2	0.0001 mg/l	0.0074 mg/l	488	362	
505	961	592	2	18	92	69	A2	0.0001 mg/l	0.0036 mg/l	489	131	
506	962	592	2	19	92	70	A2	0.0001 mg/l	0.0033 mg/l	490	215	
507	963	592	2	20	92	71	A2	0.0001 mg/l	0.0040 mg/l	491	208	
508	964	592	2	21	92	72	A2	0.0001 mg/l	0.0031 mg/l	492	138	
509	965	592	2	22	92	73	A2	0.0001 mg/l	0.0036 mg/l	493	180	
510	966	592	2	23	92	74	A2	0.0001 mg/l	0.0037 mg/l	494	185	
511	967	592	2	24	92	75	A2	0.0001 mg/l	0.0025 mg/l	495	92	
512	968	592	2	25	92	76	A2	0.0001 mg/l	0.0024 mg/l	496	85	
513	969	592	2	26	92	77	A2	0.0001 mg/l	0.0057 mg/l	497	138	
514	970	592	2	27	92	78	A2	0.0001 mg/l	0.0014 mg/l	498	362	
515	971	592	2	28	92	79	A2	0.0001 mg/l	0.0023 mg/l	499	62	
516	972	592	2	29	92	80	A2	0.0001 mg/l	0.0031 mg/l	500	138	
517	973	592	3	1	92	81	A2	0.0001 mg/l	0.0024 mg/l	501	85	
518	974	592	3	2	92	82	A2	0.0001 mg/l	0.0023 mg/l	502	62	
519	975	592	3	3	92	83	A2	0.0001 mg/l	0.0028 mg/l	503	62	
520	976	592	3	4	92	84	A2	0.0001 mg/l	0.0015 mg/l	504	115	
521	977	592	3	5	92	85	A2	0.0001 mg/l	0.0027 mg/l	505	169	
522	978	592	3	6	92	86	A2	0.0001 mg/l	0.0026 mg/l	506	108	
523	979	592	3	7	92	87	A2	0.0001 mg/l	0.0023 mg/l	507	77	
524	980	592	3	8	92	88	A2	0.0001 mg/l	0.0026 mg/l	508	108	
525	981	592	3	9	92	89	A2	0.0001 mg/l	0.0033 mg/l	509	154	
526	982	592	3	10	92	90	A2	0.0001 mg/l	0.0025 mg/l	510	92	
527	983	592	3	11	92	91	A2	0.0001 mg/l	0.0016 mg/l	511	23	
528	984	592	3	12	92	92	A2	0.0001 mg/l	0.0015 mg/l	512	15	
529	985	592	3	13	92	93	A2	0.0001 mg/l	0.0022 mg/l	513	46	
530	986	592	3	14	92	94	A2	0.0001 mg/l	0.0018 mg/l	514	77	
531	987	592	3	15	92	95	A2	0.0001 mg/l	0.0016 mg/l	515	69	
532	988	592	3	16	92	96	A2	0.0001 mg/l	0.0027 mg/l	516	108	

FRIENDS OF THE EARTH v. LAIDLAW ENVIRONMENTAL SERVICES (TOC)
D.S.C. Civ. No. 3:92-1697-17

CHRONOLOGICAL LIST OF DEFENDANT'S OUTFALL 001 DISCHARGE VIOLATIONS

[1] Rec. Violation #	[2] Old Violation #	[3] DMR Period	[4] Date of Violation M	D	Y	[5] Parameter	Type	[6] Percent Limit Amount Units	[7] Measured Value Amount Units	[8] Certificate of Analysis Rdcv # Limit	[9] % Over Limit	[10] Number of Violations
533	989	592	3	17	92	97	A2	0.0001 mg/l	0.0018 mg/l	517	38	
534	990	592	3	18	92	98	A2	0.0001 mg/l	0.0014 mg/l	518	862	
535	991	592	3	19	92	99	A2	0.0001 mg/l	0.0025 mg/l	519	92	
536	992	592	3	20	92	100	A2	0.0001 mg/l	0.0026 mg/l	520	108	
537	993	592	3	21	92	101	A2	0.0001 mg/l	0.0022 mg/l	521	69	
538	994	592	3	22	92	102	A2	0.0001 mg/l	0.0019 mg/l	522	46	
539	995	592	3	23	92	103	A2	0.0001 mg/l	0.0016 mg/l	523	177	
540	996	592	3	24	92	104	A2	0.0001 mg/l	0.0036 mg/l	524	177	
541	997	592	3	25	92	105	A2	0.0001 mg/l	0.0019 mg/l	525	208	
542	998	592	3	26	92	106	A2	0.0001 mg/l	0.0018 mg/l	526	192	
543	999	592	3	27	92	107	A2	0.0001 mg/l	0.0018 mg/l	527	154	
544	1000	592	3	28	92	108	A2	0.0001 mg/l	0.0068 mg/l	528	1362	
545	1001	592	3	29	92	109	A2	0.0001 mg/l	0.0024 mg/l	529	425	
546	1002	592	3	30	92	110	A2	0.0001 mg/l	0.0015 mg/l	530	85	
547	1003	592	3	31	92	111	A2	0.0001 mg/l	0.0024 mg/l	531	85	
548	1004	592	4	1	92	112	A2	0.0001 mg/l	0.0027 mg/l	532	108	
549	1005	592	4	2	92	113	A2	0.0001 mg/l	0.0026 mg/l	533	108	
550	1006	592	4	3	92	114	A2	0.0001 mg/l	0.0032 mg/l	534	146	
551	1007	592	4	4	92	115	A2	0.0001 mg/l	0.0031 mg/l	535	138	
552	1008	592	4	5	92	116	A2	0.0001 mg/l	0.0038 mg/l	536	192	
553	1009	592	4	6	92	117	A2	0.0001 mg/l	0.0054 mg/l	537	315	
554	1010	592	4	7	92	118	A2	0.0001 mg/l	0.0161 mg/l	538	1131	
555	1011	592	4	8	92	119	A2	0.0001 mg/l	0.0038 mg/l	539	192	
556	1012	592	4	9	92	120	A2	0.0001 mg/l	0.0031 mg/l	540	131	
557	1013	592	4	10	92	121	A2	0.0001 mg/l	0.0064 mg/l	541	362	
558	1014	592	4	11	92	122	A2	0.0001 mg/l	0.0108 mg/l	542	769	
559	1015	592	4	12	92	123	A2	0.0001 mg/l	0.0140 mg/l	543	1046	
560	1016	592	4	13	92	124	A2	0.0001 mg/l	0.0145 mg/l	544	1015	
561	1017	592	4	14	92	125	A2	0.0001 mg/l	0.0039 mg/l	545	15	
562	1018	592	4	15	92	126	A2	0.0001 mg/l	0.0023 mg/l	546	46	
563	1019	592	4	16	92	127	A2	0.0001 mg/l	0.0018 mg/l	547	77	
564	1020	592	4	17	92	128	A2	0.0001 mg/l	0.0016 mg/l	548	38	
565	1021	592	4	18	92	129	A2	0.0001 mg/l	0.0027 mg/l	549	108	
566	1022	592	4	19	92	130	A2	0.0001 mg/l	0.0026 mg/l	550	108	
567	1023	592	4	20	92	131	A2	0.0001 mg/l	0.0016 mg/l	551	23	
568	1024	592	4	21	92	132	A2	0.0001 mg/l	0.0018 mg/l	552	38	

[1] New Violation #	[2] Old Violation #	[3] DMR Period	[4] Date of Violation M	D	Y	[5] Parameter	Type	[6] Permit Limit Amount	Units	[7] Measured Value Amount	Units	[8] Certificate of Analysis Rates #	Limit	[9] % Over	[10] Number of Violations

(1) For ease of reference plaintiffs have numbered each of the violations listed in this exhibit

(2) The entries in this column identify the old violation number

(3) The entries in this column identify the discharge monitoring period in which the violation occurred

(4) This column identifies the dates of defendant's violations by month (M) day(s) (d) and year (Y). Monthly violations are identified by month and year only.

(5) The entries in this column identify the parameters for which the defendant violated the discharge limitations in its NPDES permit. The following abbreviations have been used:

Hg Mercury

(6) The entries in this column identify the discharge limitations set forth in defendant's NPDES permit which were violated. The following abbreviations have been used:

M Maximum
mg/l milligrams/liter

(7) The entries in this column identify the measured value of defendant's discharge as set forth in its certificate of analysis

(8) The entries in this column identify the Rates number of the defendant's certificate of analysis

(9) The entries in this column identify the percent by which defendant's discharge of the pollutant exceeded the amount allowed by its NPDES permit

(10) Violation of daily maximum discharge limitations are counted as 1 day of violation

CHRONOLOGICAL LISTING OF EXCEEDANCES OF DISCHARGE LIMITATIONS
FOR NPDES PERMIT SC0003646 AT SEARS-ROEBUCK STORE
D.S.C. Civ. No. 92-3097-17
EXHIBIT 1

Appendix B
Economic Benefit Calculations

		Economic Benefit as of Penalty Payment Date
Penalty Items	**Category**	**October 95**
1 Neutralization System	Capital and O&M	$ 303,276
2 Lancy System	Capital and O&M	$1,744,000
3 Carbon Adsorption System	Capital and O&M	$ 232,756
4 Pre-Filter	Capital and O&M	$ 71,806
5 Gas Scrubber Study	One-Time	$ 15,824
6 Wastewater Study	One-Time	$ 25,164
7 ISCO Sampler	One-Time	$ 4,856
8 Miscellaneous One-Time Expenses	One-Time	$ 40,810
Credit Items		
1 Ion Exchange System	Capital	($ 48,584)
2 Micro Filter (Piping Only)	Capital	($ 21,100)
3 Rental of Micro Filter Units	O&M	($ 23,485)
4 Rental of ISCO Sampler	O&M	($ 5,529)
5 Rental of Carbon Adsorption System	O&M	($ 21,332)
6 1992 Wastewater Disposal	O&M	($ 24,009)
7 Fish Tissue Study	One-Time	($ 18,154)
8 O&M Cost Savings	O&M	($ 401,759)
9 Lost Earnings from Incinerator Shutdown	One-Time	($ 623,352)
	Subtotal Credit Items	($1,187,304)
Payment to DHEC	One-Time	($ 158,607)
NET ECONOMIC BENEFIT		$1,092,581

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Friends of the Earth, Inc.; Citizens Local Environmental Action Network, Inc.; and Sierra Club,

Plaintiffs,

v.

Laidlaw Environmental Services (TOC), Inc.

Defendant.

JUDGMENT

C/A No. 3:92-1697-17

This action came to trial without a jury before the court, the Honorable Joseph F. Anderson, Jr., District Judge, presiding. The issues having been duly heard, and the court's Findings of Facts and Conclusions of Law having been duly rendered by order filed January 22, 1997,

IT IS ORDERED AND ADJUDGED that this court has jurisdiction over the defendant Laidlaw Environmental Services (TOC), Inc.'s violations of the mercury discharge limitation and the violations of the monitoring and reporting requirements of its NPDES permit, and the Clean Water Act 33 USC §1365.

IT IS FURTHER ORDERED AND ADJUDGED that the defendant, Laidlaw Environmental Services (TOC), Inc. is assessed a civil penalty in the amount of Four Hundred Five Thousand and Eight Hundred and no/100 ($405,800.00) Dollars. Post judgment interest shall accrue at the rate of 5.61%.

Further, the court having duly heard and granted in part on June 27, 1995, defendant Laidlaw Environmental Services (TOC), Inc.'s motion for summary judgment,

IT IS ORDERED AND ADJUDGED that partial summary judgment is entered for the defendant Laidlaw Environmental Services (TOC), Inc. as to the plaintiffs' allegations of effluent discharge violations other than mercury.

LARRY W. PROPES, CLERK

January 22, 1997
Columbia, South Carolina

By: _____
Gail Hayden, Deputy Clerk

SO APPROVED:

_____
Joseph F. Anderson, Jr.
United States District Judge

[RELEVANT DOCKET ENTRIES FROM]

GENERAL DOCKET FOR
Fourth Circuit Court of Appeals

Court of Appeals Docket # 97-1246 Filed 2/25/97
Nsuit 3893 Environmental Matters
Friends of the Earth, et al v Laidlaw Environ Ser
Appeal from District of South Carolina at Columbia

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Docket as of March 4, 1999 11:00 pm Page 5

Proceedings include all events.
97-1246 Friends of the Earth, et al v. Laidlaw Environ Ser

2/25/97 Civil case docketed. (db) [97-1246]

2/25/97 Docketing notice issued. [97-1246] (db) [97-1246]

2/26/97 Docketing notice issued. [97-1261] (db) [97-1261]

2/26/97 CLERK ORDER FILED consolidating case 97-1261 with 97-1246. [2517266-1] XAP Appellant: Friends of the Earth, et al. Copies to all counsel. [97-1246, 97-1261] (db) [97-1246 97-1261]

8/6/97 Page-proof cross-appeal brief filed by Appellant Friends of the Earth in 97-1246, Appellant Citizens Local Envir in 97-1246, Appellant Sierra Club in 97-1246, Appellee Friends of the Earth in 97-1261, Appellee Citizens Local Envir in 97-1261, Appellee Sierra Club in 97-1261 Type of Service: PM Copies of brief: 4 # brf pages: 119. Sufficient[Y/N]? y. [97-1246, 97-1261]

Appellee(s) page-proof cross-appeal brief due 9/5/97 for Laidlaw Environ Ser in 97-1246, for Laidlaw Environ Ser in 97-1261. (rba) [97-1246 97-1261]

9/5/97 Page-proof cross-appeal brief filed by Appellee Laidlaw Environ Ser in 97-1246, Appellant Laidlaw Environ Ser in 97-1261. Type of Service: PM Copies of brief: 4 # brf pages: 102 Sufficient[Y/N]?: y. [97-1246, 97-1261] Appellant(s) page-proof cross-reply brief due 10/6/97 for Sierra Club in 97-1246, for Citizens Local Envir in 97-1246, for Friends of the Earth in 97-1246, for Sierra Club in 97-1261, for Citizens Local Envir in 97-1261, for Friends of the Earth in 97-1261 . (rba) [97-1246 97-1261]

9/12/97 Amicus curiae brief filed by Amicus Curiae SC Chamber of Comm in 97-1246, Amicus Curiae Environmental Mgmt in 97-1246, Amicus Curiae SC Mfrs Alliance in 97-1246, Potential Amicus Curiae SC Chamber of Comm in 97-1261, Potential Amicus Curiae Environmental Mgmt in 97-1261, Potential Amicus Curiae SC Mfrs Alliance in 97-1261. Type of Service: G-per clerk order dated 9/11/97 Copies of brief: 5 # am. br copies: 5 Sufficient [Y/N]?: Y. [97-1246, 97-1261] (llh) [97-1246 97-1261]

10/27/97 Page-proof cross-appeal reply brief filed by Appellant Friends of the Earth in 97-1246, Appellant Citizens Local Envir in 97-1246, Appellant Sierra Club in 97-1246, Appellee

Friends of the Earth in 97-1261, Appellee Citizens Local Envir in 97-1261, Appellee Sierra Club in 97-1261. Type of Service: PM Copies of brief: 4 # brf pages: 61 plus addendum. Sufficient[Y/N]?: y. n. [97-1246, 97-1261] Cross-appeal joint appendix due 11/10/97 for Citizens Local Envir in 97-1246, for Friends of the Earth in 97-1246, for Citizens Local Envir in 97-1261, for Friends of the Earth in 97-1261. (wtc) [97-1246 97-1261]

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11/4/97 Response/answer filed by Appellee Laidlaw Environ Ser in 97-1246, Appellant Laidlaw Environ Ser in 97-1261 to motion to file amicus brief [2655604-1] in 97-1246, 97-1261. [2660031-1]. [97-1246, 97-1261] (db) [97-1246 97-1261]

11/5/97 Amicus curiae brief filed by Amicus Curiae CA Public Interest in 97-1246, Amicus Curiae FL Public Interest in 97-1246, Amicus Curiae IL Public Interest in 97-1246, Amicus Curiae MA Public Interest in 97-1246, Amicus Curiae Public Interest MI in 97-1246, Amicus Curiae Public Interest NJ in 97-1246, Amicus Curiae OH Public Interest in 97-1246, Amicus Curiae OR State Public Int in 97-1246, Amicus Curiae

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11/10/97 Rule 30(c) cross joint appendix filed by Appellant Friends of the Earth in 97-1246, Appellant Citizens Local Envir in 97-1246, Appellant Sierra Club in 97-1246, Appellee Laidlaw Environ Ser in 97-1246, Appellee Friends of the Earth in 97-1261, Appellee Citizens Local Envir in 97-1261, Appellee Sierra Club in 97-1261, Appellant Laidlaw

Environ Ser in 97-1261. Type of Service: PM Copies of apx: 6 #pages: 728 Sufficient [Y/N]: y. [97-1246, 97-1261] Rule 30c Appellant(s) cross-brief due 11/20/97 for Sierra Club in 97-1246, for Citizens Local Envir in 97-1246, for Friends of the Earth in 97-1246, for Sierra Club in 97-1261, for Citizens Local Envir in 97-1261, for Friends of the Earth in 97-1261. Rule 30c appellee(s) cross-brief due 11/20/97 for Laidlaw Environ Ser in 97-1246, for Laidlaw Environ Ser in 97-1261. Rule 30c appellant(s) cross/reply brief due 11/20/97 for Sierra Club in 97-1246, for Citizens Local Envir in 97-1246, for Friends of the Earth in 97-1246, for Sierra Club in 97-1261, for Citizens Local Envir in 97-1261, for Friends of the Earth in 97-1261. (rba) [97-1246 97-1261]

11/12/97 Response/answer filed by Appellant Friends of the Earth in 97-1246, Appellant Citizens Local Envir in 97-1246, Appellant Sierra Club in 97-1246, Appellee Friends of the Earth in 97-1261, Appellee Citizens Local Envir in 97-1261, Appellee Sierra Club in 97-1261 to motion to file amicus brief [2663546-1] in 97-1261, 97-1261. [2664221-1]. [97-1246, 97-1261] (db) [97-1246 97-1261]

11/13/97 Brief filed by Amicus Curiae CA Public Interest in 97-1246, Amicus Curiae FL Public Interest in 97-1246, Amicus Curiae IL Public Interest in 97-1246, Amicus Curiae MA Public Interest in 97-1246, Amicus Curiae Public Interest MI in 97-1246, Amicus Curiae Public

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11/20/97 Rule 30c cross-brief filed by Appellant Friends of the Earth in 97-1246, Appellant Citizens Local Envir in 97-1246, Appellant Sierra Club in 97-1246, Appellee Friends of the Earth in 97-1261, Appellee Citizens Local Envir in 97-1261, Appellee Sierra Club in 97-1261. Type of Service: PM Copies of brief: 8 # pages: 104 Sufficient? [Y/N]: y (wtc) [97-1246 97-1261]

11/20/97 Rule 30c appellant(s) cross-reply brief filed by Appellant Friends of the Earth in 97-1246, Appellant Citizens Local Envir in 97-1246, Appellant Sierra Club in 97-1246, Appellee Friends of the Earth in 97-1261, Appellee Citizens Local Envir in 97-1261, Appellee Sierra Club in 97-1261 Type of Service: PM

Copies: 8 # pages: 79. Sufficient [Y/N]: y. [97-1246, 97-1261] (wtc) [97-1246 97-1261]

11/21/97 Rule 30c cross-brief filed by Appellee Laidlaw Environ Ser in 97-1246, Appellant Laidlaw Environ Ser in 97-1261. Type of Service: PM Copies of brief: 8 # pages: 101 Sufficient [Y/N]: y (rba) [97-1246 97-1261]

11/21/97 Rule 30c appellee(s) cross-reply brief filed by Appellee Laidlaw Environ Ser in 97-1246, Appellant Laidlaw Environ Ser in 97-1261 Type of Service: PM Copies: 8 # pages: 28. Sufficient [Y/N]: y. . [97-1246, 97-1261] (rba) [97-1246 97-1261]

11/26/97 Supplemental brief filed by Appellant Friends of the Earth in 97-1246, Appellant Citizens Local Envir in 97-1246, Appellant Sierra Club in 97-1246. Type of Service: PM Copies of brief: 8 # brf pages: 16 . [97-1246, 97-1261] (rba) [97-1246 97-1261]

12/18/97 Supplemental authorities (FRAP 28(j)) filed by Appellant Friends of the Earth in 97-1246, Appellant Citizens Local Envir in 97-1246, Appellant Sierra Club in 97-1246 [2686446-1]. [97-1246, 97-1261] (llh) [97-1246 97-1261]

1/13/98 Supplemental authorities (FRAP 28(j)) filed by Appellant Friends of the Earth in 97-1246, Appellant Citizens Local Envir in 97-1246, Appellant Sierra Club in 97-1246, Appellant Laidlaw Environ Ser in 97-1261 [2699359-1].

[97-1246, 97-1261] (rba) [97-1246 97-1261]

3/5/98 Oral argument heard. Donald Alan Cockrill for Appellee Laidlaw Environ Ser in 97-1246, Bruce J. Terris for Appellant Sierra Club, Appellant Citizens Local Envir, Appellant Friends of the Earth in 97-1246, Donald Alan Cockrill for Appellant Laidlaw Environ Ser in 97-1261, Bruce J. Terris for Appellee Sierra Club, Appellee Citizens Local Envir, Appellee Friends of the Earth in 97-1261 Courtroom Deputy: JPH. [97-1246, 97-1261] (jph) [97-1246 97-1261]

3/13/98 Motion filed by Appellant Friends of the Earth in 97-1246, Appellant Citizens Local Envir in 97-1246, Appellant Sierra Club in 97-1246, Appellee Friends of the Earth in 97-1261, Appellee Citizens Local Envir in 97-1261, Appellee Sierra Club in 97-1261 to file supplemental briefs [2733521-1]. Supplemental brief tendered? (Y/N): n. [97-1246, 97-1261] (dhb) [97-1246 97-1261]

3/13/98 Response/answer requested to [2733521-1] motion to file supplemental briefs. Response/answer due 3/20/98 for Laidlaw Environ Ser in 97-1246, for Laidlaw Environ Ser in 97-1261, [2733521-1] motion to file supplemental briefs in 97-1261 [97-1246, 97-1261] (dhb) [97-1246 97-1261]

3/24/98 Record (partial record as requested by Court) on appeal filed. Pleadings: Vol. 1 SEALED:

Vol. 2 (pldg.). [97-1246, 97-1261] (db) [97-1246 97-1261]

3/24/98 Response/answer filed by Appellee Laidlaw Environ Ser in 97-1246, Appellant Laidlaw Environ Ser in 97-1261 to motion to file supplemental briefs [2733521-1] in 97-1261, 97-1261. [2739837-1]. [97-1246, 97-1261] (llh) [97-1246 97-1261]

4/7/98 COURT ORDER filed granting motion to file supplemental briefs [2733521-1] Appellant supplemental brief due 4/22/98 for Sierra Club in 97-1246, for Citizens Local Envir in 97-1246, for Friends of the Earth in 97-1246, appellee's response due 15 days from receipt of appellants' brief. Appellee supplemental brief due. in 97-1246, 97-1261 Copies to all counsel. [97-1246, 97-1261] (rba) [97-1246 97-1261]

4/16/98 Supplemental authorities (FRAP 28(j)) filed by Appellee Laidlaw Environ Ser in 97-1246, Appellee Friends of the Earth in 97-1261, Appellee Citizens Local Envir in 97-1261, Appellee Sierra Club in 97-1261 [2754990-1]. [97-1246, 97-1261] (rba) [97-1246 97-1261]

4/24/98 Supplemental brief filed by Appellant Friends of the Earth in 97-1246, Appellant Citizens Local Envir in 97-1246, Appellant Sierra Club in 97-1246. Type of Service: PM Copies of brief: 8 # brf pages: 20. [97-1246, 97-1261] (rba) [97-1246 97-1261]

5/6/98	Second supplemental brief filed by Appellee Laidlaw Environ Ser in 97-1246. Type of Service: CD Copies of brief: 8 # brf pages: 15. SEALED?[Y/N]: n. [97-1246, 97-1261] (rba) [97-1246 97-1261]
7/6/98	Supplemental authorities (FRAP 28(j)) filed by Appellant Friends of the Earth in 97-1246, Appellant Citizens Local Envir in 97-1246, Appellant Sierra Club in 97-1246 [2800196-1]. [97-1246, 97-1261] (rba) [97-1246 97-1261]
7/9/98	COURT ORDER filed granting motion to file amicus supplemental brief for US out of time [2784444-1] in 97-1246, 97-1261 Copies to all counsel. [97-1246, 97-1261] (rba) [97-1246 97-1261]
7/9/98	Amicus curiae brief filed by Amicus Curiae US in 97-1246, Amicus Curiae US in 97-1261. Type of Service: G order dated 7/9/98 # am. br copies: 8 Sufficient[Y/N]?: y. [97-1246, 97-1261] (rba) [97-1246 97-1261]
7/16/98	Published, authored opinion filed. [97-1246, 97-1261] (db) [97-1246 97-1261]
7/16/98	Judgment order filed. Decision: vacated and remanded. [97-1246, 97-1261] (db) [97-1246 97-1261]
8/7/98	Mandate issued. [97-1246, 97-1261] (db) [97-1246 97-1261]
11/23/98	Supreme Court notice that petition for certiorari

	was filed on 11/09/98. Spct No. : 98-822 Spct Pty 1: Friends of the Earth, et al Spct Pty 2: Laidlaw Environmental Svcs. [97-1246] (cw) [97-1246]
2/25/99	Federal Reporter Citation: 149 F. 3d 303. [97-1246, 97-1261] (cpg) [97-1246 97-1261]
3/3/99	Supreme Court order received granting petition certiorari [2887195-1] on 03/01/99 . [97-1246] (cw) [97-1246]

(8)

Supreme Court, U.S.
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No. 98-822

IN THE

Supreme Court of The United States

FRIENDS OF THE EARTH, *et al.*,
Petitioners,

v.

LAIDLAW ENVIRONMENTAL SERVICES (TOC), INC.,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

BRIEF FOR PETITIONERS

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6188

QUESTIONS PRESENTED

1. Whether a citizen suit seeking civil penalties under Section 505 of the Clean Water Act is constitutionally moot under *Steel Co. v. Citizens for Better Environment*, 118 S. Ct. 1003 (1998), due to lack of redressability, where plaintiffs had standing at the time of the complaint and have shown continuing injury-in-fact but have not obtained injunctive relief.

2. Whether a citizen suit seeking civil penalties under Section 505 of the Clean Water Act is constitutionally moot under *Steel Co.*, due to lack of redressability, when the district court has rendered a declaratory judgment as to liability and the issue of liability was contested.

3. Whether plaintiffs could not be awarded attorneys' fees or litigation costs because the case was dismissed for mootness, even if the litigation was responsible for bringing the defendant into compliance with the Clean Water Act.

PARTIES TO THE PROCEEDING

The plaintiffs are Friends of the Earth, Citizens Local Environmental Action Network, Inc. ("CLEAN"), and the Sierra Club. The defendant was Laidlaw Environmental Services (TOC), Inc., now Safety-Kleen (Roebuck), Inc.

CORPORATE DISCLOSURE STATEMENT

Each of the plaintiffs is a not-for-profit corporation. None of the plaintiffs has a parent company and, as to each corporation, no publicly held company owns 10% or more of the corporation's stock.

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1987 U.S. Code Cong. & Ad. News 5 27
100th Cong., 2d Sess., Sen. Print 144 (Nov. 1988) 46

Miscellaneous :

13A Charles Alan Wright *et al.*, *Federal Practice and Procedure* (2d ed. 1984) 13, 32

OPINIONS BELOW

The opinion of the court of appeals was published at 149 F.3d 303 (4th Cir. 1998) and is reprinted in the Appendix to the Petition for a Writ of Certiorari ("Pet. App.") at 1a. The oral standing opinion of the district court was unpublished. Hr'g Tr., June 30, 1993, p. 40. The preclusion opinion of the district court was published at 890 F. Supp. 470 (D.S.C. 1995) and is reprinted at J.A. 84-137. The relief opinion of the district court was published at 956 F. Supp. 588 (D.S.C. 1997) and is reprinted at J.A. 138-197.

JURISDICTION

The judgment of the court of appeals was entered on July 16, 1998 (Pet. App. 3a). The jurisdiction of this Court was invoked under 28 U.S.C. 1254(1) in a Petition filed on November 9, 1998. The Petition was granted on March 1, 1999.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 2 of Article III of the United States Constitution is appended hereto. The relevant sections of the Federal Water Pollution Control Act, commonly known as the Clean Water Act, 33 U.S.C. 1365(a), 1365(d), 1365(g), and 1319(d) are set forth at Pet. App. 10a.

STATUTORY BACKGROUND

Congress enacted the Federal Water Pollution Control Act, commonly known as the Clean Water Act, in 1972. The 1972 statute represented a distinct change in federal water pollution control policy. Prior to 1972, the federal water pollution control law "emphasized state enforcement of water quality standards." *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 11 (1981).

This system of pollution control led to substantial problems in enforcement because of the difficulty in establishing precise limitations for particular pollutants on the basis of the water quality desired for the receiving bodies of water. *See* S. Rep.

No. 414, 92d Cong., 1st Sess. 8, 12 (1971). The effort to control water pollution using only this method was found to be "inadequate in every vital aspect." S. Rep. No. 414, *supra*, p. 7.

The 1972 legislation "shifted the emphasis to 'direct restrictions on discharges,' and made it 'unlawful for any person to discharge a pollutant without obtaining a permit and complying with its terms'"(citations omitted). *Sea Clammers*, 453 U.S. at 11. The change in both emphasis and method was described in the Senate Report (S. Rep. No. 414, *supra*, p. 42):

> This section [Section 301, now 33 U.S.C. 1311] clearly establishes that the discharge of pollutants is unlawful. Unlike its predecessor program which permitted the discharge of certain amounts of pollutants under the conditions described above, this legislation would clearly establish that no one has the right to pollute – that pollution continues because of technological limits, not because of any inherent right to use the nation's waterways for the purpose of disposing of wastes.

The Act's overall goal of completely eliminating the discharge of all pollutants (33 U.S.C. 1251(a)(1)) was effectuated through Section 301(a) of the Act, 33 U.S.C. 1311(a), which states:

> Except as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this Act, the discharge of any pollutant by any person shall be unlawful.

Thus, there is a total prohibition on the discharge of pollutants except pursuant to specific authorization.

Section 402 of the Act provides for the issuance of discharge permits–known as National Pollutant Discharge Elimination System (NPDES) permits. These permits are designed to impose progressively more stringent limitations on the

discharge of pollutants in order to improve the nation's waters. Compliance with an NPDES permit is deemed compliance with Section 301 and allows discharges which would otherwise be unlawful. *See* 33 U.S.C. 1342(k). Conversely, noncompliance with a permit constitutes noncompliance with Section 301 and is a violation of the Act.

Section 402(a)(1), 33 U.S.C. 1342 (a)(1), authorizes the Administrator of EPA or a State, if its permit program has been approved by the Administrator, to issue NPDES permits. The Act requires each NPDES permit to: (a) include discharge limitations; (b) require the permittee to be in compliance with the discharge limitations in the permit; and (c) require the permittee to monitor its discharges as EPA requires and report the results accurately to EPA and the state in discharge monitoring reports ("DMR's"). 33 U.S.C. 1342. Generally, permit holders are required to submit DMR's on a monthly basis to EPA and the state regulatory authority.

The NPDES permitting system also provides for citizen participation in the issuance of permits. Citizens have the opportunity to comment on NPDES permit requirements before they are imposed and to challenge the final permit administratively and judicially. 33 U.S.C. 1342(b)(3), 1369(b); 40 C.F.R. 124.10. Citizen participation is a critical aspect of the NPDES permitting system. *See* 33 U.S.C. 1251(e).

"The[] Act[] contain[s] unusually elaborate enforcement provisions, conferring authority to sue for this purpose both on government officials and private citizens." *Sea Clammers*, 453 U.S. at 13. Section 505(a) of the Act, 33 U.S.C. 1365(a) (Pet. App. 10a), allows any "citizen" to bring suit to enforce any limitation in an NPDES permit. Section 505(g), 33 U.S.C. 1365(g) (Pet. App. 11a), defines citizen as "a person or persons having an interest which is or may be adversely affected." Section 505(a) authorizes the courts to issue injunctive relief and impose civil penalties.

STATEMENT OF THE CASE

Defendant Laidlaw operates a hazardous waste incinerator. 956 F. Supp. at 593 (J.A. 141). As part of its operation, Laidlaw discharges wastewater into the North Tyger River pursuant to an NPDES permit issued by the South Carolina Department of Health and Environmental Control ("DHEC"). *Ibid.* The applicable permit limits the discharge of specified pollutants, including mercury, lead, nickel, arsenic, cadmium, chromium and zinc. *Id.* at 593 (J.A. 141-142). It also requires Laidlaw to monitor its discharge and report the level of pollutants discharged to EPA and DHEC. *Id.* at 593 (J.A. 142). From January 1987 through January 1995, Laidlaw violated its permit limitation for mercury 489 times. 956 F. Supp. at 610, 613-621 (J.A.158, 185-196). Laidlaw also violated its non-mercury metals discharge limitations and its pH limitation 439 times.[1] Pl. Exs. 98-99.[2] In addition, it violated the monitoring requirements of its permit 420 times and the reporting requirements 503 times. 956 F. Supp. at 610 (J.A. 159).

Laidlaw's discharge violations were due to an inadequate treatment system and its failure to control adequately its mercury feed rate, *i.e.*, the amount of mercury in the waste fed into the incinerator. 890 F. Supp. at 478 (J.A. 92). Laidlaw gradually added treatment equipment from 1987 to 1991. *Id.* at 482 (J.A. 102-103). The Lancy system, installed in 1991, corrected most of Laidlaw's non-mercury metals violations. *Id.* at 483 (J.A. 104). However, Laidlaw's mercury violations increased in early 1992. Laidlaw violated its mercury limitation 103 times from January 1992 through May 1992, the

[1] The district court granted Laidlaw's motion for summary judgment on all of its non-mercury discharge violations, since none of those limitations had been violated subsequent to the filing of the complaint. 956 F. Supp. at 592 (J.A. 139-140).

[2] Plaintiffs' Exhibits 98 and 99 were admitted into evidence at volume III, page 5, of the 1993 Trial Transcript (hereafter "1993 Tr.").

period immediately prior to the filing of the complaint, including violations as much as 13 times over its permit limitation. 956 F. Supp. at 619-621 (J.A. 193-195). The increase in violations is explained by Laidlaw's failure to control its mercury feed rate, which it knew was needed to achieve compliance after the installation of the Lancy system. Def. Exs. 54, 105, 144; Pl. Ex. 143; Pl. Ex. 126, figure 1; Stipulation of December 11, 1996, Appendix 1, pp. 16-19.[3]

In July 1992, a month after plaintiffs filed suit, Laidlaw reduced its mercury feed rate and installed new carbon adsorption equipment. 890 F. Supp. at 478, 483 (J.A. 92, 104); Pl. Ex. 126, figure 1; Pl. Ex. 143. In January 1993, Laidlaw installed equipment that aided the performance of the carbon filters in removing mercury. 890 F. Supp. at 483 (J.A. 104). As a result, the number and severity of its mercury violations dropped. 956 F. Supp. at 621 (J.A. 195). Nonetheless, Laidlaw violated the mercury discharge limitation in its permit 13 times after the complaint was filed. *Ibid.*

Mercury is an extremely toxic pollutant. 956 F. Supp. at 601 (J.A. 160). Laidlaw's mercury limitation is a water-quality-based permit limitation.[4] Laidlaw's 489 excessive discharges alone caused the water quality standard for the River to be

[3] Defendant's Exhibits 54, 105 and 144 were admitted into evidence at 1993 Tr., vol. I, p. 40. Plaintiffs' Exhibits 126 and 143 were admitted into evidence at pages 205 and 83, respectively, of the 1995 Trial Transcript (hereafter "1995 Tr.").

[4] Water quality-based permit limitations are designed to ensure that the receiving water meets the ambient water quality standards. *PIRG v. Powell Duffryn Terminals, Inc.*, 720 F. Supp. 1158, 1162 (D.N.J. 1989), aff'd in part and rev'd in part on other grounds, 913 F.2d 64 (3d Cir. 1990). Violation of a water quality-based permit limitation harms the receiving water. *Ibid.*

violated. Pl. Ex. 88, pp. 11-12;[5] 1993 Tr., vol. II, pp.194-195.

Plaintiffs Friends of the Earth, CLEAN and Sierra Club have members who use or refrain from using the waterways affected by Laidlaw's discharge. The members would like to picnic, birdwatch and hike near, boat on, and eat fish from the North Tyger River and downstream waters but either do not do so or are concerned when they do so because of the pollution in the River. They are also concerned about the impact of that pollution on the value of their homes and on their dairy products because cows drink from the River. Curtis Aff., ¶¶ 3-8; 2d Curtis Aff., ¶¶ 2-8; Moore Aff., ¶¶ 3-6; 2d Moore Aff., ¶¶ 3-7; 3d Moore Aff., ¶ 4; McCullough Aff., ¶¶ 9, 10; Sharp Aff., ¶¶ 4-6; Patterson Aff., ¶¶ 3-9; Lee Aff., ¶¶ 4-7; Pruitt Aff., ¶¶ 3-6.[6]

Plaintiffs brought this action on June 12, 1992, under the citizen suit provision of the Clean Water Act, Section 505, 33 U.S.C. 1365 (Pet. App. 10a-11a), to enforce the terms and conditions of Laidlaw's permit. Laidlaw moved to dismiss Friends of the Earth, but not the other plaintiffs, for lack of standing on the ground that its members had not suffered injury-in-fact. On June 30, 1993, the district court orally denied the motion. Hr'g Tr., June 30, 1993, p. 40.

Laidlaw subsequently moved to dismiss under Section 505(b)(1)(B) of the Act, 33 U.S.C. 1365(b)(1)(B), on the ground that the suit was precluded because the State had brought an action in state court against Laidlaw three days before plaintiffs' action was filed. 890 F. Supp. at 474 (J.A. 85). The complaint in the state case had been drafted and filed by Laidlaw's counsel and the filing fee was paid by Laidlaw.

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[5] Plaintiffs' Exhibit 88 was admitted into evidence at 1993 Tr., vol. I, p. 40.

[6] These affidavits are exhibits to Plaintiffs' Brief in Support of Their Motion for Preliminary Injunctive Relief, October 5, 1992, and Plaintiffs' Supplemental Opposition to Defendant's Motion for Summary Judgment as to Plaintiff Friends of the Earth, June 28, 1993.

Id. at 479 (J.A. 94). The complaint was filed at the request of Laidlaw for the purpose of barring plaintiffs' suit. *Id.* at 478 (J.A. 93-94). The district court denied the motion after a seven-day evidentiary hearing on the ground that the state action had not been diligently prosecuted for several reasons, but primarily because the $100,000 penalty did not remove the economic benefit enjoyed by Laidlaw as the result of its delayed compliance. *Id.* at 489-491, 497-499 (J.A. 116-120, 134-136).

On July 31, 1995, the district court began a three-day trial on liability and relief. 956 F. Supp. at 592 (J.A. 140). At the conclusion of the testimony, the district court reserved judgment until a decision was issued in a state administrative proceeding involving a challenge to a change in the mercury limitation in Laidlaw's permit. *Ibid.* As a result, the district court did not issue its decision until January 22, 1997.

The district court found that Laidlaw had violated the mercury limitation in its permit 489 times, including 13 times after the complaint was filed. 956 F. Supp. at 600, 621 (J.A. 158, 195). The court also found that Laidlaw had violated the monitoring requirements in its permit 420 times and the reporting requirements 503 times, including 13 monitoring and 10 reporting violations after the complaint was filed. *Id.* at 600-601 (J.A. 159). The court found that Laidlaw had enjoyed an economic benefit of $1,092,581 from its violation of its permit. *Id.* at 603 (J.A. 165). However, the court concluded that a penalty of $405,800 was an adequate deterrent, when considered together with the attorneys' fees award that Laidlaw would be required to pay plaintiffs and Laidlaw's own litigation expenses. *Id.* at 610-611 (J.A. 181-182). The district court denied plaintiffs' request for injunctive relief because Laidlaw had achieved substantial compliance with its permit. *Id.* at 611 (J.A. 183).

Both sides appealed the district court's decisions. Laidlaw appealed, *inter alia*, on the ground that Friends of the Earth

lacked standing because of its alleged failure to show injury-in-fact. The day before oral argument in the court of appeals, this Court decided *Steel Co. v. Citizens for Better Environment*, 118 S. Ct. 1003 (1998). Plaintiffs filed a motion asking for the opportunity to submit a brief showing that the decision in *Steel Co.* had no application. Laidlaw responded that *Steel Co.* "is largely irrelevant to the standing issue before this Court." Def.-Appellee's Opp. to Pls.' Mot. for Leave to File an Additional Br., March 18, 1998, p. 1. The court of appeals granted plaintiffs' motion and directed the parties to brief the applicability of *Steel Co.* and respond to a series of questions regarding standing and mootness.

In their brief, plaintiffs argued that *Steel Co.* was not applicable to a case involving on-going violations. Instead, plaintiffs argued, the standing and mootness issues raised by the court of appeals were controlled by *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*, 484 U.S. 49 (1987).

The court of appeals vacated and remanded with instructions to dismiss on the ground that the case was moot based on this Court's decision in *Steel Co.* 149 F.3d at 307 (Pet. App. 8a-9a). The court of appeals did not consider *Gwaltney* or the distinction between initial standing and mootness and applied the standing analysis in *Steel Co.* to the issue of whether a case has become moot. It assumed "without deciding that Plaintiffs had standing to initiate this action and have proven a continuous injury in fact." *Id.* at 306, n. 3 (Pet. App. 7a, n. 3). It reasoned that "[b]ecause Plaintiffs have not appealed the denial of declaratory and injunctive relief, the only potential relief that may be available to redress their claimed injuries is the civil penalty imposed upon Laidlaw" and "[s]uch penalties * * * cannot redress any injury suffered by a citizen plaintiff." 149 F.3d at 306 (Pet. App. 7a).[2]

[2] Laidlaw suggests that the case is moot because it has shut down its incinerator since the court of appeals issued its decision. Resp. Br. in Opp. to Pet. for Writ of Cert., pp. 1, n. 1 and 10. Plaintiffs have ascertained that Laidlaw has not taken any action to terminate the NPDES permit. Reply Br. in Support of Pet. for Writ of Cert., App. 33a (hereafter "Reply App."). Since Laidlaw's NPDES permit is still in effect, it may discharge in the future whenever it cares to do so.

In November 1998, after the incinerator shut down, Laidlaw filed a proposed order in the state court which was hearing a challenge to Laidlaw's NPDES permit. In that order, Laidlaw asked that issuance of the permit be affirmed and gave no indication that the incinerator would not be operated. Subsequently, on November 23, 1998, the court issued a virtually identical order.

The shut down of the facility, even if it were permanent, would not moot the case. Laidlaw/Safety-Kleen has at least 16 other NPDES permitted facilities. Friends of the Earth and Sierra Club have members who use the waters affected by Laidlaw/Safety-Kleen's discharges from some of these facilities and their use and enjoyment of these waters is adversely affected by illegal discharges from these facilities. *See* Reply App. 33a. The issuance of civil penalties in this case would deter Laidlaw from violating the statute at these other facilities.

In a footnote, the court of appeals also decided that "[p]laintiffs' failure to obtain relief on the merits of their claims precludes any recovery of attorneys' fees or other litigation costs because such an award is available only to a 'prevailing or substantially prevailing party.'" 149 F.3d at 307, n. 5 (Pet. App. 9a, n. 5).

SUMMARY OF ARGUMENT

1. In *Steel Co.* this Court determined that civil penalties payable to the United States Treasury did not redress the plaintiff's claim because the plaintiff did not make an allegation of continuing violation. Applying *Steel Co.*, the court of appeals here determined that plaintiffs' claim for civil penalties was moot absent a live claim for injunctive or declaratory relief because their injury could not be redressed by a civil penalty payable to the federal treasury. The court of appeals erred by applying this Court's analysis in *Steel Co.* to hold plaintiffs' claim for civil penalties moot where, unlike *in*

Steel Co., plaintiffs alleged and proved a continuing violation and the district court determined that the civil penalty imposed would deter Laidlaw from violating the Act in the future.

The court of appeals' application of *Steel Co.* created a direct conflict with this Court's decision in *Gwaltney*. *Gwaltney*, like this case, was a citizen suit under the Clean Water Act, where the plaintiffs alleged a continuing violation and the district court imposed a civil penalty but denied an injunction. As here, the denial of injunctive relief was not appealed. When *Gwaltney* reached this Court, the petitioner raised the same redressability argument adopted by the court of appeals here. This Court found standing in *Gwaltney* and, necessarily, determined that the case was not moot since, after discussing mootness generally, it proceeded to the non-constitutional issues. *Gwaltney* applies *a fortiori* here, since Laidlaw committed numerous post-complaint violations whereas in *Gwaltney* there were none. There is no indication, direct or implicit, in *Steel Co.* to suggest that it overruled *Gwaltney*.

The difference in the outcomes of *Steel Co.* and *Gwaltney*, is fully explicable based on the fact that there were no continuing violations alleged or proven in *Steel Co.* In addition, this Court has repeatedly held that there are sharply different standards for standing and mootness. A showing of mootness requires that it be "absolutely clear" that the illegal conduct "could not be reasonably expected to recur." *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968). *See also Gwaltney*, 484 U.S. at 66. This difference is presumably based on the different functions of standing and mootness. Standing serves a gatekeeper function to prevent inappropriate cases from being litigated in the federal courts. Mootness serves to protect against the unwarranted dismissal of actions in which the parties and the courts have often invested substantial resources.

The court of appeals failed to consider the district court's

finding that the penalty imposed would deter Laidlaw's illegal conduct. Although the district court denied injunctive relief based on equitable considerations, it did not find that such relief was moot. It specifically found that the civil penalty it imposed would deter Laidlaw's illegal conduct. This determination is consistent with the conclusions of both this Court and Congress that civil penalties under the Clean Water Act deter future violations. Thus, the civil penalties in this case redress the harm to plaintiffs.

The court of appeals' decision undermines Congress' carefully-constructed program for citizen enforcement of environmental laws because it requires, as a matter of federal constitutional law, the dismissal of any citizen suit brought against a party that has violated a federal environmental law as long as that party comes into compliance prior to final judgment. In this case, even though Laidlaw had violated the Clean Water Act hundreds of times before the complaint was filed and continued to violate the Act afterwards, the court of appeals concluded that mootness compelled the lawsuit's dismissal. Without disputing the district court's findings that Laidlaw had enjoyed a large economic benefit through its violation of the Act, the court of appeals precluded the imposition of any civil penalty. The decision thereby creates perverse incentives that encourage violation of the Act and dilatory litigation practices. It also discourages citizens from bringing suit and playing the integral role in enforcement of the Act that Congress intended.

2. The court of appeals also erred in deciding that plaintiffs had not been awarded a declaratory judgment. In fact, a declaratory judgment had been awarded over Laidlaw's opposition and therefore, even under *Steel Co.* itself, this case was not moot.

3. The court of appeals also erred in deciding that, because this lawsuit was moot, plaintiffs were not entitled to an award

of attorneys' fees and expenses even though the suit acted as a catalyst for Laidlaw to come into compliance with the Clean Water Act. This Court recognized the "catalyst rule" in a series of cases, including *Gwaltney*. It did not overrule those decisions *sub silentio* in *Farrar v. Hobby*, 506 U.S. 103 (1992).

ARGUMENT

I. PLAINTIFFS' CLAIM FOR CIVIL PENALTIES AGAINST LAIDLAW IS NOT MOOT

The court of appeals stated that mootness is standing set in a later time frame. 149 F.3d at 306 (Pet. App. 6a). It assumed that plaintiffs' members had suffered injury-in-fact and that the injury was continuing at the time the complaint was filed. *Id.* at 306, n. 3 (Pet. App. 7a, n. 3). However, applying this Court's standing decision in *Steel Co.*, it found that the case was moot because plaintiffs could no longer satisfy the redressability prong of the standing test. 149 F.3d at 306 (Pet. App. 7a). It reasoned that "[b]ecause Plaintiffs have not appealed the denial of declaratory and injunctive relief,[8/] the only potential relief that may be available to redress their claimed injuries is the civil penalty imposed upon Laidlaw" and "[s]uch penalties * * * cannot redress any injury suffered by a citizen plaintiff." *Id.* at 306 (Pet. App. 7a).

The court of appeals erred in applying the redressability analysis regarding civil penalties from *Steel Co.*, a standing case that did not involve an allegation of ongoing violation which could be deterred by the imposition of civil penalties, to a case involving an allegation of ongoing violation and the actual continuation of violations that the district court determined could be deterred by civil penalties. As a result, the court of appeals' decision is in direct conflict with this Court's decision in *Gwaltney*, where, despite facts nearly identical to

8/ Declaratory relief was not denied. We address this error below. *See* pp. 41-42 below.

those here, this Court concluded that the case was not moot and that the plaintiffs had standing.9/

The assessment of mootness requires a "highly individualistic, and usually intuitive, appraisal of the facts of each case." 13A Charles Alan Wright *et al.*, *Federal Practice and Procedure* § 3533, at pp. 211-212 (2d ed. 1984). "The central question nonetheless is constant–whether decision of a once living dispute continues to be justified by a sufficient prospect that the decision will have an impact on the parties." *Id.*, p. 212.

As we show below, if the court of appeals had engaged in such an appraisal of the facts, it would have found that the district court determined that the civil penalty it imposed would deter Laidlaw from discharging excessive pollutants in violation of the Act. Civil penalties that deter Laidlaw from renewing its violations of the Act redress plaintiffs' interest in protecting the waterways that they use or refrain from using due to pollutants entering those waterways.

A. *Gwaltney*, Not *Steel Co.*, Is Controlling

1. *Gwaltney* and This Case Are Indistinguishable

Steel Co. involved a citizen suit under the Emergency Planning and Community Right to Know Act (EPCRA), 42 U.S.C. 11046(a)(1). In that case, the defendant brought itself into full compliance with the reporting requirements of EPCRA after receiving the plaintiff's notice of intent to sue -- or 60-day notice letter, as it is commonly known -- but prior to the filing of the complaint. 118 S. Ct. at 1009. As a result, the plaintiff was not able to allege a continuing violation in the complaint (*see id.* at 1020) and did not seek an injunction ordering the defendant to comply with EPCRA (*Citizens for a Better Env't*

9/ The only difference between *Gwaltney* and the present case is that Laidlaw had post-complaint violations whereas, in *Gwaltney*, the last violation was a month before the filing of the complaint. 484 U.S. at 53-54.

v. Steel Co., 42 Env't Rep. Cas. (BNA) 1186, 1189-1190 (N.D. Ill. 1995)).[10] It was because of the plaintiff's failure, indeed its inability, to allege a continuing violation or the likelihood of a continuing violation that this Court found that the plaintiff could not satisfy the redressability prong of the standing test. 118 S. Ct. at 1020. The Court specifically stated: "[b]ecause respondent alleges only past infractions of EPCRA, and not a continuing violation or the likelihood of a future violation, injunctive relief will not redress its injury." *Ibid.*

The Court examined each of the other forms of relief requested by the plaintiff to see if any of those forms of relief would serve to redress the plaintiff's injuries. 118 S. Ct. at 1018-1019. The Court concluded that none of the requested relief would remedy the injury suffered by the plaintiff. *Ibid.* With regard to the claim for civil penalties, which are payable to the United States Treasury, the Court reasoned (*ibid.*):

> In requesting [civil penalties], therefore, respondent seeks not remediation of its own injury – reimbursement for the costs it incurred as a result of the late filing – but vindication of the rule of law – the "undifferentiated public interest" in faithful execution of EPCRA.
>
> * * *
>
> By the mere bringing of his suit, *every* plaintiff demonstrates his belief that a favorable judgment will make him happier. But although a suitor may derive great comfort and joy from the fact that the United States Treasury is not cheated, that a wrongdoer gets his just desserts, or that the nation's laws are faithfully enforced, that psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article

[10] A continuous violation, or an ongoing violation as it is sometimes called, means an ongoing violation at the time of the complaint. *Gwaltney*, 484 U.S. at 64-66.

> III injury. [emphasis in original; citations omitted]

Having concluded that none of the relief requested could redress plaintiff's injury, the Court vacated the judgment and remanded the case with instructions to dismiss the complaint. 118 S. Ct. 1020. The merits were never reached.

Gwaltney involved a citizen suit under the Clean Water Act, 33 U.S.C. 1251, *et seq.* Unlike the plaintiff in *Steel Co.*, the plaintiffs in *Gwaltney* alleged a continuing or ongoing violation of the Act. 484 U.S. at 54. In their complaint, they sought injunctive relief and civil penalties. *Ibid.*

In *Gwaltney*, the defendant's violations ceased a month before the complaint was filed. 484 U.S. at 53-54; *Chesapeake Bay Found. v. Gwaltney of Smithfield, Ltd.*, 890 F.2d 690, 692 (4th Cir. 1989)(full procedural history of the case detailed in remand decision). As a result, no injunctive relief was awarded by the district court. 890 F.2d at 692, n. 2. This ruling was not appealed to the Fourth Circuit (*see id.* at 692) and therefore was not before this Court. By the time that this Court issued its decision, there had been no violations for three and a half years. Consequently, the sole remaining claim was for civil penalties. This fact was specifically pointed out by the petitioner to this Court. Reply Br. for Pet'r at 16, *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49 (1987) (No. 86-473)(Pet. App. 40a)(hereafter "*Gwaltney* Reply Br."). *See* 484 U.S. at 66. Moreover, the petitioner in *Gwaltney* made the identical redressability argument that the court of appeals adopted in the present case. *Gwaltney* Reply Br., pp. 15-18 (Pet. App. 39a-43a). Nonetheless, this Court specifically held that the plaintiffs had constitutional standing under Article III to seek imposition of civil penalties despite the fact that injunctive relief was no longer being sought[11] (484 U.S. at 64-66) and proceeded to the merits.

[11] *See also Steel Co.*, 118 S. Ct. at 1011 ("Article III standing was in any event found [in *Gwaltney*]").

All the facts in *Gwaltney* were plain and undisputed before this Court. The record was clear that the district court had issued no injunction against future violations, the plaintiffs had not appealed this ruling, and no violations had occurred for over three years by the time of this Court's decision. In addition, the petitioner had squarely raised the issues of constitutional standing and mootness before this Court. 484 U.S. at 65-66; *Gwaltney* Reply Br., pp. 15-18 (Pet. App. 39a-43a). Yet, neither this Court nor the Fourth Circuit, on remand, dismissed the case as moot. *See* 484 U.S. at 67; 890 F.2d at 696-697.

This Court emphasized in *Steel Co.* that its long-established practice is to insist on the determination of constitutional jurisdictional issues before dealing with the merits. 118 S. Ct. at 1012-1013. This proposition applies just as much to mootness as to standing. In a case decided well before *Gwaltney*, this Court stated (*United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950)):

> The established practice of [this] Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss.

It would therefore have been inconsistent with Article III of the Constitution and this Court's "established practice" for this Court to have ignored in *Gwaltney* a substantial jurisdictional problem that had been explicitly raised before it.

When this Court reached the statutory jurisdictional issue in *Gwaltney*, it necessarily decided that the case was not moot even though injunctive relief was no longer viable. Otherwise, *Gwaltney*, like *Steel Co.*, should have been vacated and remanded with instructions to dismiss. *See, e.g., Deakins v. Monaghan*, 484 U.S. 193, 204 (1988).

This Court's holding on the statutory jurisdictional issue in

Gwaltney further shows that injunctive relief is not a *sine qua non* to civil penalty relief in a citizen suit. This Court held that "citizens * * * may seek civil penalties only in a suit brought to *enjoin or otherwise abate an ongoing violation*" (emphasis added). 484 U.S. at 59. The emphasized language, which is stated in the disjunctive, shows that civil penalties are available in a citizen suit when injunctive relief is not. As we show below (pp. 24-40), civil penalties, as well as injunctive relief, abate ongoing violations -- which, under *Gwaltney*, 484 U.S. at 64-66, means the risk of further violations at the time of the complaint. Obviously, it would have been pointless for this Court to have reached this conclusion if such circumstances created a lack of jurisdiction under Article III. Since this Court found constitutional standing in *Gwaltney* and implicitly, but clearly, held that the case was not moot, it necessarily concluded in *Gwaltney* that injunctive relief is not essential for Article III jurisdiction in a citizen suit where ongoing violations are alleged and proved.

When this Court remanded *Gwaltney* to the Fourth Court for further consideration, it again necessarily determined that the case was not moot and therefore that the Fourth Circuit had jurisdiction.[12] In response to the petitioner's mootness argument, which specifically raised the issue of redressability, this Court discussed the applicability of mootness to citizen suits under the Clean Water Act. 484 U.S. at 66-67. This Court did not find that the case was moot since, in the paragraph immediately following the discussion of mootness,

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[12] Similarly, when the Fourth Circuit remanded *Gwaltney* to the district court for determination of whether the plaintiffs proved at trial that there was a reasonable likelihood of continuing or intermittent violations at the time they brought suit, it was necessarily holding that the case was not moot. 844 F.2d 170, 171 (1988). When the case returned to the Fourth Circuit after the remand, the Fourth Circuit expressly held that the case was not moot. 890 F.2d at 690.

it stated that it was remanding the case for a determination whether the complaint's allegation of continuing violations was made in good faith. 484 U.S. 67. There could be no possible reason for a remand if the case was moot because of the absence of injunctive relief.

This case is governed *a fortiori* by *Gwaltney*. In both cases, the defendant came into compliance with its permit before the district court issued its decision on the relief issues. *Gwaltney*, 890 F.2d at 692; *Laidlaw*, 956 F. Supp. at 611 (J.A. 183). As a result, in both cases, the district court did not issue an injunction. *Ibid.* Instead, in both cases, the district court imposed only a civil penalty. *Gwaltney*, 611 F. Supp. 1542, 1565 (E.D. Va. 1985); *Laidlaw*, 956 F. Supp. at 610 (J.A. 181). The only difference between the two cases is that here Laidlaw did not come into compliance until well after the complaint had been filed. *See* 956 F. Supp. at 611, 621 (J.A. 183, 195).

In neither *Gwaltney* nor *Laidlaw* did the defendant meet the heavy burden of showing that injunctive relief was moot. *See* pp. 32-33 below (discussion of burden). Indeed, Laidlaw did not even attempt to make such a showing. As discussed below, (pp. 31-35), the district court merely determined that an injunction was not warranted and that civil penalties would provide an ample deterrent against future violation. 956 F. Supp. at 610-611 (J.A. 182-183). Likewise, the district court in *Gwaltney* thought that the penalty that it assessed would have a deterrent effect on the defendant. 611 F. Supp. at 1564. The issue of injunctive relief in *Gwaltney* and here was eliminated from the case by virtue of its not having been awarded and no appeal of its denial being taken.

Thus, under *Gwaltney*, this case is not moot and it should be remanded to the lower court to decide the remaining issues.

2. *Steel Co.* Did Not Overrule *Gwaltney*

The court of appeals did not even address *Gwaltney*, despite its direct relevance to the court of appeals' mootness

determination.[13] Instead, it based its decision on *Steel Co.* The only basis for the court of appeals to have based its decision on *Steel Co.*, instead of *Gwaltney*, is if *Steel Co.* overruled *Gwaltney*.

There is no indication in *Steel Co.* that *Gwaltney* has been overruled. On the contrary, in *Steel Co.*, during its lengthy discussion of its long-standing practice to determine as a threshold matter that it has jurisdiction (118 S. Ct. at 1009-1016), the Court specifically cited *Gwaltney* as a case in which this practice had been followed (*id.* at 1011). In fact, in *Steel Co.*, the Court specifically reaffirmed that Article III standing was found in *Gwaltney*.[14] *Ibid.*

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[13] Plaintiffs relied heavily on *Gwaltney* throughout their brief on the *Steel Co.* issue in the Fourth Circuit. *See* Second Supplemental Br. for Appellants, April 24, 1998. Yet, the court of appeals did not even mention *Gwaltney*, except to reject it with a "but see" citation on the separate attorneys' fee issue. *See* 149 F.3d at 307, n. 5 (Pet. App. 9a, n. 5). Plaintiffs submit that this was not an oversight; *Gwaltney* simply cannot be squared with *Laidlaw*.

A district court has held that the decision in *Laidlaw* implicitly overturned the Fourth Circuit's prior decision in *Gwaltney*, 890 F.2d at 696-697, which held that "the mooting of a claim for injunctive relief does not moot a claim for CWA civil *penalties*" (emphasis added). *DuBois v. United States Dep't of Agric.*, 20 F. Supp. 2d 263, 268, n. 4 (D.N.H. 1998), appeal stayed pending this Court's decision in *Laidlaw* (No. 98-2364, 1st Cir., April 2, 1999). The court of appeals' decision in *Laidlaw* likewise implicitly overturned this Court's decision in *Gwaltney*.

[14] Justice Stevens' concurring opinion in *Steel Co.* suggests that standing may not have been decided in *Gwaltney*. 118 S. Ct. at 1025. This is directly contradicted by the statement in the Court's opinion in *Steel Co.* that standing was found in *Gwaltney*. *Id.* at 1011.

Moreover, as a matter of logic, standing had to have been found in *Gwaltney*. The majority opinion in *Steel Co.* requires that constitutional jurisdictional issues, such as standing, be decided before non-constitutional jurisdictional issues or the merits may be reached. 118 S. Ct. at 1012-1013. On the other hand, Justice Stevens, in his concurring opinion in *Steel Co.*, would allow statutory jurisdiction to be decided first where a decision on

In addition, there is nothing implicit in the *Steel Co.* decision that would suggest that *Gwaltney* was being overruled or limited. *Steel Co.* indicates that a citizen plaintiff has standing throughout a case regardless of whether the violations cease as long as the violations were continuing at the time of the complaint or at least that there was a risk that such violations were continuing at the time of the complaint. This Court stated twice that the outcome on standing in *Steel Co.* would have been different if the plaintiff had alleged a continuing violation (118 S. Ct. at 1019, 1020):

> The latter objective can of course be "remedial" for Article III purposes, when threatened injury is one of the gravamens [sic] of the complaint. *If respondent had alleged a continuing violation or the imminence of a future violation, the injunctive relief requested would*

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that issue could avoid a more difficult constitutional jurisdiction issue. *Id.* at 1021. However, Justice Stevens' approach can only apply if the court finds that the plaintiff loses on some other ground so that the constitutional issue of jurisdiction need not be reached.

This Court in *Gwaltney* did not dismiss the case on a statutory jurisdictional ground. On the contrary, it remanded the case to the Fourth Circuit (484 U.S. at 67) to determine a non-constitutional jurisdictional issue -- namely, whether the plaintiff had provided adequate proof that there was a risk of continuing violations at the time the complaint was filed. If, as the Fourth Circuit found (*Gwaltney*, 890 F.2d at 695), plaintiff had provided such proof, the case could proceed.

Therefore, this Court necessarily determined in *Gwaltney* that there was constitutional jurisdiction, including standing, under the approach of both the majority and Justice Stevens in *Steel Co.* For even under Justice Stevens' approach, if the resolution of the non-constitutional issue does not result in dismissal, the constitutional jurisdictional issues, such as standing and mootness, must be decided before the plaintiff can be allowed to continue its case. *See* 118 S. Ct. at 1023. Since this Court allowed the plaintiffs' case in *Gwaltney* to proceed, it had to have held that the plaintiffs had constitutional standing.

This same analysis applies equally to this Court's mootness determination in *Gwaltney*. *See* pp. 16-18 above.

> *remedy that alleged harm.* But there is no such allegation here--and on the facts of the case, there seems no basis for it.
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> * * *
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> *Because respondent alleges only past infractions of EPRCA [sic], and not a continuing violation or the likelihood of a future violation, injunctive relief will not redress its injury.* [emphases added]

This language demonstrates that the determining factor in *Steel Co.* was the plaintiff's inability to make and prove an allegation of continuing violation at the time of the complaint. There was no reason for this Court to have been so focused on the timing of the complaint vis-a-vis the defendant's violations if it meant to hold that Article III requires continued violations through the point of final resolution of the case.

Justice Scalia's concurring opinion in *Gwaltney* strongly supports this reading of his subsequent opinion for the Court in *Steel Co.* In *Gwaltney*, a case where there was an allegation of continuing violation and no post-complaint violations, Justice Scalia predicted in his concurring opinion the outcome in a case like *Steel Co.* where there was no allegation of continuing violation. Justice Scalia stated in *Gwaltney* (484 U.S. at 70-71):

> While Gwaltney did not seek certiorari (or even appeal to the Court of Appeals) on the denial of its motion to dismiss for lack of standing, it did raise the standing issue before us here, see Reply Brief for Petitioner 17-18, and we in any event have an independent obligation to inquire into standing where it is doubtful, see *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 * * * (1986). If it is undisputed that the defendant was in a state of compliance when this suit was filed, the plaintiffs would have been suffering no remediable injury in fact that could support suit. The constitutional requirement

for such injury is reflected in the statute itself, which defines "citizen" as one who has "an interest which is or may be adversely affected."

Accordingly, even on the Court's theory of this case it seems to me that the remand should require the lower court to consider not just good-faith allegations of a state of violation but its actual existence. To be sure, nothing in the Court's opinion *precludes* such consideration of standing, but under sound practice the remand should *require* it. Of course that disposition would call attention to the fact that we have interpreted the statute to confer subject-matter jurisdiction over a class of cases in which, by the terms of the statute itself, there cannot possibly be standing to sue. [some citations omitted; emphases in original]

Reading Justice Scalia's two opinions together, there is no Article III standing in a case where no allegation of continuing violation can be made or the allegation is made but there is no proof of continuing violations, but there is Article III standing and continues to be standing in a case where the plaintiff proves continuing violations or the risk of continuing violations at the time of the complaint, even though the violations actually cease during the pendency of the case. Since this case falls into the latter category, due to Laidlaw's post-complaint violations, there is and continues to be Article III standing according to Justice Scalia's opinions in both *Gwaltney* and *Steel Co.*

The holding in *Steel Co.* is therefore limited to citizen suits where the plaintiff cannot and does not make an allegation of continuing violations. This reading of *Steel Co.* is necessary to avoid a conflict with *Gwaltney*. Here, plaintiffs alleged and proved continuing violations. Am. Compl., para. 24 (J.A. 38); 956 F. Supp. at 600 (J.A. 158). Thus, this case is controlled by *Gwaltney*, not *Steel Co.*

3. Contrary to the Decision Below, the Standards for Mootness and Standing Are Different

Even if the distinction between *Steel Co.* and *Gwaltney* was not the difference in the allegations regarding ongoing violation, the difference in their outcomes would still be fully explainable by the difference in the standards for standing and mootness. This Court has held that injunctive relief is moot only if the defendant can meet the heavy burden of showing that it is "*absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur" (emphasis added). *Concentrated Phosphate*, 393 U.S. at 203. In *Steel Co.* itself, the Court emphasized the difference between initial standing and mootness (118 S. Ct. at 1019-1020):

> The United States, as *amicus curiae*, argues that the injunctive relief does constitute remediation because "there is a presumption of [future] injury when this defendant has voluntarily ceased its illegal activity in response to litigation," even if that occurs before a complaint is filed. * * * The "presumption" the Government refers to has been applied to refute the assertion of mootness by a defendant who, when sued in a complaint that alleges present or threatened injury, ceases the complained-of activity. See *e.g.*, *United States v. W.T. Grant Co.*, 345 U.S. 629 * * * (1953). It is an immense and unacceptable stretch to call the presumption into service as a substitute for the allegation of present or threatened injury upon which initial standing must be based. [alteration in original]

Although this Court did not explain in either *Gwaltney* or *Steel Co.* why standing and mootness are assessed differently for purposes of redressability, there are sound reasons for this distinction.

Standing serves a gatekeeping function. It serves to keep cases that are not justiciable out of the courthouse. Mootness,

on the other hand, does not serve the same gatekeeping function. By the time mootness is an issue, the case has been brought and litigated, often for years. This Court's holdings making it extremely difficult for a case to be dismissed as moot serve to protect the rights and resources of the parties and the courts.

Moreover, the wasting of time and resources could become a vicious circle if a case were easily dismissed due to the voluntary cessation of the illegal conduct. In such circumstances, defendants would be free to resume illegal conduct, cease such conduct during suit to avoid the consequences of the suit, resume the illegal conduct when the case was dismissed as moot, and so on. *See City of Mesquite v. Aladdin's Castle*, 455 U.S. 283, 289 (1982); *Concentrated Phosphate*, 393 U.S. at 203 ("Mere voluntary cessation of allegedly illegal conduct does not moot a case; if it did, the courts would be compelled to leave '[t]he defendant * * * free to return to his old ways'" (alteration in original)). Avoiding repetitious litigation serves the public interest and compels the stringent test this Court has adopted for mootness of injunctive relief. *Cf. W.T. Grant Co.*, 345 U.S. at 632.

In sum, the court of appeals' decision to apply *Steel Co.* to a mootness question was erroneous.

B. The Civil Penalties Imposed by the District Court Benefit Plaintiffs because They Deter Laidlaw from Violating its Permit and the Act

The court of appeals concluded that civil penalties could not support redressability on the ground that in *Steel Co.* this Court had found that "any civil penalties imposed would be payable to the United States Treasury and not to the plaintiff and therefore that the penalties would not benefit the plaintiff." 149 F.3d at 306 (Pet. App. 8a). However, this Court's conclusion in *Steel Co.* is in the context of a case where the plaintiff could not allege and prove an ongoing violation. Civil penalties,

even though paid to the United States Treasury, undoubtedly benefit a plaintiff who makes and proves an allegation of ongoing violation because they deter future illegal conduct by the defendant.

As we show below, the decisions of this Court make clear that civil penalties serve to deter a defendant's unlawful conduct, particularly under the Clean Water Act. In addition, the district court explicitly found that the civil penalty imposed here would deter Laidlaw from future violations.

1. Civil Penalties Deter Violations by the Defendant

This Court has determined that civil penalties under the Water Act deter defendants from future violations. *Tull v. United States*, 481 U.S. 412, 422-423 (1987); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 314 (1982).

Tull involved the issue of whether the Seventh Amendment right to a jury trial applied to the liability determination for alleged violations of the Clean Water Act and/or the penalty assessment for such violations. This Court analyzed Section 309(d) of the Act, 33 U.S.C. 1319(d), which governs the imposition of civil penalties under the Act, its purpose, its legislative history and other factors. In doing so, this Court stated that (481 U.S. at 422-423):

> A civil penalty was a type of remedy at common law that could only be enforced in courts of law. Remedies intended to punish culpable individuals, as opposed to those intended simply to extract compensation or restore the status quo, were issued by courts of law, not courts of equity. The action authorized by [33 U.S.C.] § 1319(d) is of this character. Subsection (d) does not direct that the "civil penalty" imposed be calculated solely on the basis of equitable determinations, such as the profits gained from violations of the statute, but simply imposes a maximum penalty of $10,000 per day of violation. *The legislative history of the Act reveals that Congress wanted*

> *the district court to consider the need for retribution and deterrence, in addition to restitution, when it imposed civil penalties.* A court can require retribution for wrongful conduct based on the seriousness of the violations, the number of prior violations, and the lack of good-faith efforts to comply with the relevant requirements. *It may also seek to deter future violations by basing the penalty on its economic impact.* [emphases added; citations and footnote omitted]

Thus, Congress intended penalties to create an economic incentive for the defendant to comply in the future.

In *Romero-Barcelo*, a citizen suit under the Clean Water Act, the district court found that the U.S. Navy was violating the Water Act by discharging ordnance into the sea without a permit. 456 U.S. at 307-308. It ordered the Navy to apply for the permit but refused to enjoin the weapons operations that resulted in the discharge. *Id.* at 309-310. The First Circuit reversed and directed the district court to enjoin all discharges until a permit was obtained, on the basis that the traditional balancing of the equities was inappropriate where there was a statutory duty to obtain a permit. *Id.* at 310-311. This Court reversed, holding that the traditional balancing test applied. *Id.* at 320. This Court reached this conclusion after determining that there was nothing in the statute or the legislative history to suggest that Congress intended to deny courts their traditional equitable discretion in issuing injunctions. *Id.* at 314-320. After stating that "[a]n injunction is not the only means of ensuring compliance,"it then cited penalties. *Id.* at 314. *See also Amoco Production Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 544 (1987).[15/] Obviously, a penalty imposed in lieu

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[15/] Consistent with *Tull* and *Romero-Barcelo*, *Gwaltney* shows that civil penalties redress violations that continued subsequent to the filing of the complaint or even threatened to continue. Since civil penalties were the sole relief left in *Gwaltney* and this Court upheld the plaintiffs' continued

of an injunction is meant to deter the defendant from violating the Act.

Congress likewise has specifically concluded, in discussing civil penalties under the Water Act, that citizen suits "have deterred violators and achieved significant compliance gains." S. Rep. No. 50, 90th Cong., 1st Sess. 28 (1985).[16/] *See also* S. Rep. No. 228, 101st Cong.,1st Sess. 373 (1989)("[t]he assessment of civil penalties for violations of the [Clean Air] Act [is] necessary for deterrence, restitution and retribution").[17/]

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standing, this Court necessarily held that civil penalties can provide redressability for the threat of continuing violations when it reached the non-constitutional issue presented and then remanded the case to the court of appeals. *See* pp. 15-18 above.

[16/] Senate Report No. 50 is part of the legislative history of the 1987 amendments to the Water Act. It accompanied S. 1128. S. 1128 became the bill accepted by the conference committee. *See* H.R. Rep. No. 1004, 99th Cong., 2d Sess. (1986) (Conference Report to accompany S. 1128). S. 1128 was enacted by Congress in 1986 and vetoed by President Reagan on November 6, 1986. In the 100th Congress, S. 1128 was enacted as H.R. 1. 133 Cong. Rec. 1262 (1987) (H.R. 1 "is absolutely identical to the conference report on S. 1128"). H.R. 1 was not accompanied by any reports. 1987 U.S. Code Cong. & Ad. News 5 (readers are referred to Senate Report 50 and House Report 1004 from the 99th Congress).

[17/] In the 1990 amendments to the Clean Air Act, Congress recognized the impact that a lack of civil penalties would have on deterrence. Senator Chafee, one of the floor managers, stated during a debate on an amendment to restrict civil penalties in citizen suits that was defeated (136 Cong. Rec. 5627)(1990)):

> I do not understand the rationale for that provision. What the polluter does, he says: "Oh, that is right. I will straighten out." So he straightens it out. And since the citizen cannot collect for any past damages and the polluters stop, then there is no ground for a suit. He stops within the 60 days. Then what happens? The polluter starts polluting again, let us say somebody upstream, upwind. Then again the citizen has to go through this rigamarole, 60 days' notice; within the 60 days give notice. And the polluter says: "Oh, dear, I am sorry." We go through this charade possibly several times.

As this Court recognized in *Tigner v. Texas*, 310 U.S. 141, 149 (1940), the issue of deterrence and how it is to be effectuated are "matters within legislative competence." As with other congressional findings, Congress' determination as to the effect of civil penalties is entitled to substantial deference. *See, e.g., Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 17 (1990)(holding that courts must defer to Congress' findings that regulated activities affect interstate commerce where a statute is challenged as an invalid exercise of congressional power under the Commerce Clause). Therefore, civil penalties, under the Clean Water Act, according to both this Court and Congress, provide redress for the harm. These conclusions are fully consistent with decisions of this Court and other federal courts that have repeatedly found that civil penalties deter the violation of a variety of federal statutes. *Hudson v. United States*, 118 S. Ct. 488, 494 (1997)("[A]ll civil penalties have some deterrent effect"); *Department of Revenue v. Kurth Ranch*, 511 U.S. 767, 778 (1994)("civil penalties * * * deter certain behavior"); *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 231 (1975)(where "the detrimental effect to the public and the advantage to the violator [of ignoring the law] continue and increase over a period of time, and the violator could eliminate the effects of the violation if it were motivated to do so," accumulating daily penalties under the consent decree between the parties can provide the motivation and deter violations).

In *Bennett v. Spear*, 117 S. Ct. 1154 (1997), the Bureau of Reclamation informed the Fish and Wildlife Service (FWS) that operation of the project might affect several endangered species in violation of the Endangered Species Act (ESA). The FWS issued a biological opinion that identified alternatives designed to avoid jeopardy to the species, including the maintenance of minimum water levels in the water bodies

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involved in the project. *Ibid.* The Bureau notified the FWS that it intended to operate the project in compliance with the biological opinion. *Ibid.* The plaintiffs claimed that they were injured because the restrictions on water levels recommended by the FWS biological opinion would cause a reduction in the amount of irrigation water available to them. *Id.* at 1160. The plaintiffs brought suit against the FWS, rather than the Bureau, to have the biological opinion set aside. *Id.* at 1159-1160. Although the Bureau was not bound to adhere to the biological opinion and reduce the water levels, this Court found that the Bureau had a strong incentive to do so to avoid the penalties for "taking" an endangered species under the ESA. *Id.* at 1165. The "powerful coercive effect" of the biological opinion on the Bureau made it likely that the plaintiffs' injury from the threatened water level restrictions would be redressed if the biological opinion were set aside. *Ibid.* Accordingly, this Court found that the plaintiffs satisfied the redressability prong of the standing test.

Five courts of appeals have held that claims for penalties in citizen suits under the Clean Water Act are not moot even though claims for injunctive relief were no longer viable because the defendants had brought themselves into compliance with the Act on the ground that the civil penalties act as a deterrent to further violations by the defendants. *ASLF v. Stroh Die Casting Co.*, 116 F.3d 814, 820 (7th Cir. 1997), cert. denied, 118 S. Ct. 442 (1997); *NRDC v. Texaco Ref. and Mktg., Inc.*, 2 F.3d 493, 503-504 (3d Cir. 1993); *ASLF v. Pan Am. Tanning Corp.*, 993 F.2d 1017, 1020-1021 (2d Cir. 1993); *ASLF v. Tyson Foods, Inc.*, 897 F.2d 1128, 1135-1136 (11th Cir. 1990); *Pawtuxet Cove Marina, Inc. v. Ciba-Geigy Corp.*, 807 F.2d 1089, 1094 (1st Cir. 1986). *See also Comfort Lake Ass'n v. Dresel Contracting, Inc.*, 138 F.3d 351, 356 (8th Cir. 1998)(dictum); *Carr v. Alta Verde Indus., Inc.*, 931 F.2d 1055, 1065, n. 9 (5th Cir. 1991)(dictum). These cases are fully

consistent with this Court's decision in *Gwaltney*.[18]

The fact that civil penalties have a deterrent effect on violators hardly requires the citation of authority. This is a matter of common sense. Virtually all of our law is founded on the assumption that the imposition of penalties deters misconduct by the defendant. It is also a matter of common sense that any remedy that deters the defendant's misconduct benefits the plaintiff by protecting it from further misconduct.

The court of appeals failed to appreciate the deterrent value of civil penalties. Penalties deter violations in a way that injunctions never can. If a violator only faced the prospect of an injunctive order requiring compliance, it would have little incentive to comply before the issuance of the injunction. As this Court stated in *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975) "[i]f employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality" in the meantime. It is the "reasonably certain prospect" of a monetary penalty that "'provide[s] the spur or catalyst'" for compliance (alteration in original)(citation omitted).

This is precisely why Congress insisted that civil penalties imposed under the Clean Water Act remove the economic benefit derived from noncompliance. 33 U.S.C. 1319(d); *Tull*, 481 U.S. at 422-424. Otherwise, a violator stands to benefit from its noncompliance. If a violator benefits from its noncompliance, it is extremely likely to continue to violate.

[18] These cases remain good law after *Steel Co.* Each of these cases is distinguishable from *Steel Co.* on exactly the same basis as this case and *Gwaltney*. All of these cases involved allegations of ongoing or continuous violations; otherwise, the courts that decided them would have lacked subject matter jurisdiction under *Gwaltney*. Therefore, just as in this case, the decision in *Steel Co.* has no relevance to these earlier cases.

2. The District Court Found that Laidlaw Will Be Deterred by the Penalty Imposed

Injunctive relief against violators of the Clean Water Act is not automatic. *Romero-Barcelo*, 456 U.S. at 311. An injunction should issue only (*id.* at 312):

> [W]here the intervention of a court of equity "is essential in order effectually to protect property rights against injuries otherwise irremediable." The Court has repeatedly held that the basis for injunctive relief in the federal courts has always been irreparable injury and the inadequacy of legal remedies.
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> Where [the parties] present competing claims of injury, the traditional function of equity has been to arrive at a "nice adjustment and reconciliation" between the competing claims. In such cases, the court "balances the conveniences of the parties and possible injuries to them according as they may be affected by the granting or withholding of the injunction." "The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it."
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> The grant of jurisdiction to ensure compliance with a statute hardly suggests an absolute duty to do so under any and all circumstances, and a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law. [citations omitted]

Thus, if the defendant's unlawful conduct can be deterred through other means, an injunction is not necessary.[19] *Id.* at 312, 314.

[19] Civil penalties were among the other means for deterrence that the Court enumerated in *Romero-Barcelo*. *See* p. 26 above.

On the other hand, injunctive relief can become moot due to the voluntary cessation of the illegal conduct, only if the defendant proves that the unlawful conduct has ceased.[20] *Concentrated Phosphate*, 393 U.S. at 203. As this Court stated in *Gwaltney*, before a claim for injunctive relief can be adjudged moot (484 U.S. at 66):

> The defendant must demonstrate that it is "*absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur." *United States v. Phosphate Export Assn., Inc.*, 393 U.S. 199, 203, 89 S.Ct. 361, 364, 21 L.Ed. 344 (1968). [emphasis added by the Court in *Gwaltney*]

Thus, there are numerous intermediate situations where neither injunctive relief nor dismissal of an injunctive relief claim based on mootness due to voluntary cessation is proper.

[20] "[M]ootness has two aspects: 'when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome.'" *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 396 (1980)(quoting *Powell v. McCormack*, 395 U.S. 486, 496 (1969)). The first aspect involves the settlement of a claim, the lack of a timely appeal, a change in the law that gave basis to the suit or the defendant's voluntarily cessation of the alleged illegal conduct during the course of the litigation. *See* 13A Wright, *supra*, §§ 3533.2, 3533.5, 3533.6 and 3533.10. The other is what has been referred to as the "personal stake" aspect of mootness. *Geraghty*, 445 U.S. at 396. The "personal stake" aspect involves situations where the plaintiff no longer has a personal stake in the outcome of the litigation. For example, in *Geraghty*, 445 U.S. at 390, the plaintiff, who challenged the validity of the parole commission's release guidelines, was released from prison while his case was on appeal and, in *Arizonans for Official English v. Arizona*, 117 S.Ct. 1055, 1059 (1997), the plaintiff state employee challenged a state law requiring that state business be conducted in only the English language, but resigned from state employment during the course of the litigation.

The mootness aspect at issue in *Gwaltney* and in this case involve the first aspect, where the issues presented are no longer "live" due to the fact that the district court denied injunctive relief and the denial was not appealed.

See, e.g., Concentrated Phosphate, 393 U.S. at 203 (even though the defendant on remand might be able to show that injunctive relief was inappropriate, the case was not moot); *W.T. Grant*, 345 U.S. at 635-636 ("We conclude that, although the actions were not moot, no abuse of discretion has been demonstrated in the trial court's refusal to award injunctive relief"). This is such a case.

The district court made clear that, in denying injunctive relief, it was not finding that violations of the permit would not occur in the future. It specifically stated that "a defendant in substantial compliance with its NPDES permit is not required to show that there is no chance of a future permit violation in order to defeat a request for injunctive relief." 956 F. Supp. at 611 (J.A. 182-183). It further stated that "[t]aken together, this court believes the above penalty, potential fee awards, and Laidlaw's own direct and indirect litigation expenses provide adequate deterrence under the circumstances of this case." *Id.* at 611 (J.A. 182) Thus, the district court specifically found that the penalty it imposed would be a deterrent to possible future violations by Laidlaw.

The district court's conclusions are supported by the evidence. Laidlaw's discharge violations were due to an inadequate treatment system and its failure to control adequately its mercury feed rate, *i.e.*, the amount of mercury introduced into the incinerator at a given time. *See* 890 F. Supp at 478 (J.A. 92). The level of mercury in Laidlaw's discharge is a function of the amount of mercury that it processes in its incinerator. 1993 Tr., vol. V, p. 208; 1995 Tr. 100-101; Def. Exs. 54, 125, 144, 167, para. 10; Pl. Ex. 130, pp. 18, 39.[21] Consequently, Laidlaw's violations depended in significant part

[21] Defendant's Exhibits 54, 125, 144 and 167 were admitted into evidence at 1993 Tr., vol. I, p. 40. Plaintiffs' Exhibit 130 was admitted into evidence at 1995 Tr., p. 13.

on the changes Laidlaw made to its mercury feed rate.[22/] The district court found that the treatment equipment that Laidlaw ultimately installed was only effective "so long as Laidlaw severely restricted the feed rate of mercury-containing waste into the incinerator." 956 F. Supp. at 599 (J.A. 147).

The district court's conclusions are consistent with the well-established law that injunctive relief is an extraordinary remedy. It is not a remedy that issues as a matter of course. *See* pp. 31-31 above. Therefore, injunctive relief may well not be issued even when, as the district court found in this case, future violations are possible and civil penalties will deter

[22/] In December 1988, Laidlaw violated its permit 16 times. *See* Pl. Ex. 143. Shortly after these violations, in February 1989, defendant acknowledged that its "mercury removal ha[d] diminished to totally unacceptable levels." Def. Ex. 54. Defendant further acknowledged that the source of the problem was, in part, "an elevated mercury level in the waste blends" and that the solution was "blending to reduce mercury levels in the feedstock." *Ibid.* Thereafter, Laidlaw reduced the amount of mercury fed into the incinerator and the number of violations was reduced. *See* Pl. Ex. 126, p. 2, Pl. Exs. 131 and 132 (admitted into evidence at 1995 Tr., pp. 205, 13 and 184-191, respectively).

In April 1991, the number of pounds of mercury fed into the incinerator was increased. Pl. Ex. 126, figure 1; Pl. Ex. 131. *See* Def. Ex. 105. This increase was based on Laidlaw's desire to increase its sales by accepting waste with a higher mercury content after it installed the Lancy system. *See* Def. Ex. 105.

From April 1991 through January 1992, the number of mercury violations dramatically increased. *See* Pl. Ex. 143. Yet, not until January 1992, did Laidlaw
begin to lower the amount of mercury introduced into the incinerator. Pl. Ex. 126, figure 1. In spite of the reduction, between February and June 1992, the number of mercury violations per month remained extremely high. *See* Pl. Ex. 143.

In July 1992, the first full month after plaintiffs filed this suit, Laidlaw reduced its mercury feed rate significantly and the level of mercury violations per month dropped. *See* Pl. Ex. 126, figure 1; Pl. Ex. 143. In that month, Laidlaw also installed new carbon adsorption equipment. 890 F. Supp. at 483 (J.A. 104).

them.

The district court's conclusion that civil penalties would deter future violations is consistent with the presumption of future injury recognized by this Court when the defendant has voluntarily ceased its illegal conduct in response to litigation. Thus, this Court has held that "[i]t is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption." *United States v. Oregon State Med. Soc'y*, 343 U.S. 326, 333 (1952). *See also* pp. 32-33 above.

This Court stated in *Tigner*, 310 U.S. at 148, that "[j]udgment on the deterrent effect of the various weapons in the armory of the law can lay little claim to scientific basis. Such judgment as yet is largely a prophecy based on meager and uninterpreted experience." Absent an extraordinary showing that civil penalties could not possibly have a deterrent effect on the defendant, civil penalties should be presumed to have the deterrent effect on a defendant that this Court and Congress have found that they have. However, such a presumption is not needed here. The record shows that Laidlaw could return at anytime to the conduct that resulted in its earlier violations and that the imposition of civil penalties is likely to deter such conduct.

C. The Court of Appeals' Decision Seriously Undermines Congress' Purpose in Providing for Citizen Enforcement of the Act

The court of appeals' decision is not only legally erroneous, but also seriously undermines Congress' efforts to ensure effective enforcement of the Clean Water Act and other environmental statutes. The citizen suit provision in the Water Act is modeled on the citizen suit provision in the Clean Air Act Amendments of 1970. S. Rep. No. 414, *supra*, p. 79. The legislative history of the Clean Air Act shows that Congress

intended citizen suits to be a significant part of the rigorous enforcement of the Act. Senator Muskie, the sponsor of the legislation, stated during the Senate debate (116 Cong. Rec. 32927 (1970)):

> What we are seeking to establish is a nationwide policy. National ambient air standards implemented by plans developed at the State and local level create potentially enormous enforcement problems for State, local, and regional governments, as well as for the National Government. I think it is too much to presume that, however well staffed or well intentioned these enforcement agencies, they will be able to monitor the potential violations of the requirements contained in all the implementation plans that will be filed under this act, all the other requirements of the act, and the responses of the enforcement officers to their duties.
>
> Citizens can be a useful instrument for detecting violations and bringing them to the attention of the enforcement agencies and courts alike. So we have provided this restrictive citizen suit provision for that purpose. We took testimony on this subject. It was strongly supported by legal scholars and several organizations.

Senator Hart added (116 Cong. Rec. 33104 (1970)):

> The basic argument for the provision is plain: namely, that Government simply is not equipped to take court action against the numerous violations of legislation of this type which are likely to occur. In testifying on a similar bill before the Senate Subcommittee on Energy, Natural Resources and the Environment, former Attorney General Ramsey Clark spoke convincingly of this inevitable incapability. Mr. Clark stated:
>
> "It will be impossible for government enforcement to

> control all significant acts of pollution .... The extension of private right, ... and effective sanctions for the persons directly affected or concerned will be essential if vital interests are to be protected. Our experience in areas of massive unlawful racial discrimination, such as in schooling, employment, and housing tells us that however hard it might try, government will never have the manpower, the techniques, or the awareness necessary to enforce the law for all. Private enforcement of those laws is the only way the individual can be assured that the rights cannot be violated with impunity.
>
> Pollution control is another such area. If we are really serious about controlling the quality of our environment before it destroys the quality of our lives, we must give the individuals affected by, or concerned about pollutions in his life, the power to stop them through legal process.
>
> Far from risking an undue or inhibiting interference with Government enforcement, it will provide powerful supplementary enforcement .... and an effective and desirable prod to officials to do their duty."

Every federal environmental statute enacted since that time has a citizen suit provision modeled on the Clean Air Act. *See, e.g.*, 33 U.S.C. 1365, 16 U.S.C. 1540(g), 42 U.S.C. 6972, 15 U.S.C. 2619, and 42 U.S.C. 9659. Congress' repeated enactment of citizen suit provisions shows that it relies on citizen enforcement as an integral part of enforcement of environmental laws. Moreover, Congress specifically commented on the success of the citizen suit provision of the Clean Water Act in enacting the 1987 amendments to the Act (S. Rep. No. 50, *supra*, p. 28):

> Citizen suits are a proven enforcement tool. They operate as Congress intended - to both spur and supplement to [sic] government enforcement actions. They have

> deterred violators and achieved significant compliance gains. In the past two years, the number of citizen suits to enforce NPDES permits has surged so that such suits now constitute a substantial portion of all enforcement actions filed in Federal court under this Act.

The court of appeals' decision eviscerates the citizen suit provision of the Water Act and creates perverse incentives that encourage violation of the Act and dilatory litigation practices. First, if civil penalties cannot be imposed for any violations as long as the defendant comes into compliance some time during the pendency of the case, the defendant has every incentive to continue its noncompliance. This allows the defendant to maximize the economic benefit it has enjoyed from its noncompliance. Only if a defendant knows that civil penalties are certain and significant will it hasten its compliance with the Act. Laidlaw's fear of substantial civil penalties in this case almost certainly affected its compliance efforts.

Second, citizen suits under the Water Act are vigorously litigated, as is the defendant's right. Therefore, citizen suits often take so long that there is time for the defendant to bring itself into full compliance years after the complaint is filed but before the case is finally resolved. If defendants know that the longer the litigation takes, the more chance they have of ultimately avoiding liability for civil penalties, they will be encouraged to take every possible action to extend the litigation. They are likely to delay responses to discovery, to file every possible motion seriatim, to appeal to the courts of appeals and seek certiorari in this Court. The result will almost certainly be to ensure that citizen suits take even more time, to make settlements extremely unlikely, to make the relationship between the parties more hostile and to burden the federal courts needlessly. Creating incentives for litigation delay is directly counter to Congress' intent that enforcement of the Water Act be "swift and direct." S. Rep. No. 414, *supra*, p. 65.

Third, these incentives for defendants to delay create strong disincentives for citizens to prosecute citizen suits at all. "Citizen plaintiffs often initiate suit not to recover monetary awards for their own benefit, but rather to ensure that penalties are imposed so as to deter future violations." *Pan Am. Tanning Corp.*, 993 F.2d at 1021. Citizens will be leery of investing years of time, effort and expense to litigate a case that, no matter how meritorious, can be dismissed at anytime with no consequence to the defendant. This is counter to "the obvious purpose of the * * * provision * * * [which] is to encourage enforcement by so-called 'private attorneys general' * * *." *Bennett v. Spear*, 117 S. Ct. at 1162 (addressing standing under the ESA citizen suit provision).

Fourth, in this case, mootness was not based on a determination by the district court that the claim was moot, but instead on the denial of injunctive relief and the plaintiffs' decision not to appeal the denial. If civil penalties are deemed moot based on whether an appeal of the denial of injunctive relief is taken, citizen plaintiffs would be compelled to appeal every denial of injunctive relief in order to keep their civil penalty claim alive.

Consequently, if the court of appeals' decision is allowed to stand, Congress' intent to create an effective alternative enforcement mechanism when the federal and state governments fail to act would be deeply undermined and citizens will no longer be able to protect their local water resources from dischargers who violate the Act.

As the Third Circuit explained in *Texaco*, 2 F.3d at 503-504, in holding that a civil penalty claim survived the mooting of an injunctive relief claim in a citizen suit:

> A citizen suit would lose much of its effectiveness if a defendant could avoid paying any penalties by post-complaint compliance. If penalty claims could be mooted, polluters would be encouraged to "delay

litigation as long as possible, knowing that they will thereby escape liability even for post-complaint violations, so long as violations have ceased at the time the suit comes to trial." Moreover, whether or not damage claims are mooted would depend on the vagaries of when the district court happens to set the case for trial. We cannot embrace a rule that would weaken the deterrent effect of the Act by diminishing incentives for citizens to sue and encourage dilatory tactics by defendants. [citations and footnotes omitted]

II. PLAINTIFFS' INJURIES ARE REDRESSED BY A DECLARATORY JUDGMENT WHERE LIABILITY WAS CONTESTED

This Court held in *Steel Co.* that a declaratory judgment as to liability does not support the redressability requirement of standing where the issue of liability was not contested (118 S. Ct. at 1018):

> There being no controversy over whether petitioner failed to file reports, or over whether such a failure constitutes a violation, the declaratory judgment is not only worthless to respondent, it is seemingly worthless to all the world.

Conversely, if liability is disputed, the plaintiff's injury is redressed by a determination that the defendant's practices are unlawful. *See Steel Co.*, 118 S. Ct. at 1018.

This Court has repeatedly found that even where a defendant has voluntary ceased an unlawful practice, a plaintiff's injury is redressed by a declaratory judgment establishing that the defendant's past practices were unlawful. *E.g., City of Mesquite*, 455 U.S. at 289; *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 121-122 (1974); *Walling v. Helmerich & Payne, Inc.*, 323 U.S. 37, 42-43 (1944). If a claim for declaratory judgment were mooted by a showing of voluntary cessation, there is nothing to prevent the defendant from resuming its

unlawful conduct at the end of the litigation. *Ibid.* Here, the declaratory relief awarded to plaintiffs, like the civil penalties, serves to deter Laidlaw by informing it that its past practices were unlawful and may not legally be resumed.

The court of appeals stated that declaratory relief had been denied to plaintiffs. 149 F.3d at 306 (Pet. App. 7a). However, this conclusion is erroneous. The district court could not have imposed, and did not impose, civil penalties without first determining that defendant's actions violated the law.

Plaintiffs sought a declaratory judgment as to liability. Am. Compl., para. A (J.A. 39). Unlike the situation in *Steel Co.*, there was a controversy over Laidlaw's violation of the law.

In its answer, Laidlaw denied all of the allegations that it had violated the discharge, monitoring and reporting requirements of its permit. Am. Compl., para. 28 (J.A. 39)(para. 27 in the prior Am. Compl.); Answer, para. 26 (J.A. 49). When plaintiffs moved for partial summary judgment on all of Laidlaw's violations, Laidlaw opposed summary judgment on its mercury discharge violations on the ground that the permit was erroneous. Def.'s Resp. in Opp. to Pls.' Mot. for Partial Summ. Judgment, June 7, 1995, p. 3. Laidlaw also argued that "most of the alleged monitoring violations are incorrect" (*ibid.*) and that most of the reporting violations likewise did not occur (*id.*, p. 5).

At trial, Laidlaw continued to dispute all of its violations. 1995 Tr., p. 11. After trial, Laidlaw informed the district court that it no longer disputed the discharge violations, but that it continued to dispute most of the monitoring and reporting violations. Def.'s Proposed Findings of Fact and Conclusions of Law, October 13, 1995, pp. 12-15; Def.'s Modified Proposed Findings of Fact and Conclusions of Law, March 29, 1996, pp. 21-24. Thus, defendant did not concede its mercury discharge violations until plaintiffs fully presented their case to the district court after three years of litigation and never conceded

its monitoring and reporting violations.

Contrary to the conclusion of the court of appeals (149 F.3d at 306 (Pet. App. 7a)), the district court issued a declaratory judgment. It determined that Laidlaw was liable for 489 discharge, 420 monitoring, and 503 reporting violations. 956 F. Supp. at 610, 613-621 (J.A. 158-159, 185-196). This determination was far from worthless; it determined that defendant had engaged in repeated, flagrant and long-standing violation of federal law. Such a decision serves to deter Laidlaw from engaging in such practices in the future even though it discontinued them during the course of the litigation. Anything that deters a defendant's violation of the Act benefits the plaintiffs, and therefore, redresses plaintiffs' injury.

Thus, the decision of the court of appeals is in conflict with *Steel Co.*, even if *Steel Co.* fully applies to the issue of mootness, where the plaintiffs alleged continuing violations and the violations continued after the complaint was filed.

III. PLAINTIFFS WOULD BE ENTITLED TO ATTORNEYS' FEES AND EXPENSES EVEN IF THE CASE WERE MOOT

Section 505(d) of the Water Act, 33 U.S.C. 1365(d), provides that "[t]he court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate." The court of appeals held that "[p]laintiffs' failure to obtain relief on the merits of their claims precludes any recovery of attorneys' fees or other litigation costs because such an award is available only to a 'prevailing or substantially prevailing party'" (citation omitted). 149 F.3d at 307, n. 5 (Pet. App. 9a, n. 5). The court reached that conclusion even though it recognized that defendant had come into compliance with its permit. *Id.* at 305 (Pet. App. 5a-6a). The court relied on this Court's decision in

Farrar v. Hobby, 506 U.S. 103 (1992), and its own decision in *S-1 and S-2 v. State Board of Education*, 21 F.3d 49 (1994) (*en banc*). 149 F.3d at 307, n. 5 (Pet. App. 9a, n. 5).

In *Farrar*, this Court considered the issue of "whether a civil rights plaintiff who receives a nominal damages award is a 'prevailing party' eligible to receive attorney's fees under 42 U.S.C. § 1988." 506 U.S. at 105. The Court explained that, "to qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim." *Id.* at 111. The Court found that an award of nominal damages was sufficient to make the plaintiff a prevailing party because "[a] judgment for damages in any amount, whether compensatory or nominal, modifies the defendant's behavior for the plaintiff's benefit by forcing the defendant to pay an amount of money he otherwise would not pay." *Id.* at 113.[23]

In the course of reaching its conclusion, the Court stated that, in order to prevail for the purpose of obtaining fees, the "plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought or comparable relief through a consent decree or settlement" (citations omitted). 506 U.S. at 111. Based on that statement and other references in *Farrar* to judgments and settlements, the Court of Appeals for the Fourth Circuit held in *S-1 and S-2* that *Farrar* had overruled the "catalyst theory," *i.e.*, the theory that a plaintiff prevails when "a lawsuit * * * operate[s] as a catalyst for post-litigation changes in a defendant's conduct * * *." 21 F.3d at 51. *See also S-1 and S-2 v. State Bd. of Educ.*, 6 F.3d 160, 168 (4th Cir. 1993) (dissenting opinion subsequently adopted by majority in *en banc* decision, 21 F.3d at 51).

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[23] The Court went on to explain that a prevailing party is only entitled to reasonable fees. 506 U.S. at 115. It upheld the denial of fees to the plaintiff because "[w]hen a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief, the only reasonable fee is usually no fee at all" (citation omitted). *Ibid.*

The catalyst rule was recognized by this Court in several decisions prior to *Farrar*. In *Hanrahan v. Hampton*, 446 U.S. 754, 756-757 (1980), the Court held that civil rights plaintiffs who had prevailed on appeal and thereby won the right to a new trial but had not yet received any relief from the district court were not "prevailing parties" under 42 U.S.C. 1988[25] for the purpose of obtaining attorneys' fees. However, the Court reviewed the legislative history of 42 U.S.C. 1988 and explained that "a person may in some circumstances be a 'prevailing party' without having obtained a favorable 'final judgment following a full trial on the merits'" (quoting H.R. Rep. No. 1558, 94th Cong., 2d Sess. 7 (1976), and citing S. Rep. No. 1011, 94th Cong., 2d Sess. 5 (1976)). 446 U.S. at 756-757. It relied on the House and Senate Reports, which stated that "parties may be considered to have prevailed when they vindicate rights through a consent judgment *or without formally obtaining relief*" (emphasis added). *Id.* at 757.[26]

The Court further articulated the catalyst rule in *Maher v. Gagne*, 448 U.S. 122 (1980). The question presented there was "whether fees may be assessed * * * after a case has been settled by the entry of a consent decree, without any determination that the plaintiff's constitutional rights have been violated." *Id.* at 124. The Court resolved the issue with little discussion, holding that "[t]he fact that respondent prevailed

[25] In *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 559-560 (1986), the Court stated that the principles to be followed in awarding attorneys' fees and expenses are the same for environmental and civil rights cases.

[26] The House Report also stated (H.R. Rep. No. 1558, *supra*, p. 7):

> Similarly, after a complaint is filed a defendant might voluntarily cease the unlawful practice. A court might still award fees even though it might conclude, as a matter of equity that no formal relief, such as an injunction, is needed.

through a settlement rather than through litigation does not weaken her claim to fees." *Id.* at 129. The Court again relied on the Senate Report's "express[] state[ment]" that fees are available when parties "vindicate rights through a consent judgment or without formally obtaining relief." *Ibid.*

In *Hewitt v. Helms*, 482 U.S. 755, 759-760 (1987), the Court issued its clearest statement of the catalyst rule. It reversed an award of attorney's fees to a plaintiff inmate who received no damages, injunctive relief, or declaratory judgment. However, it emphasized that (*id.* at 760-761):

> It is settled law, of course, that relief need not be judicially decreed in order to justify a fee award under § 1988. A lawsuit sometimes produces voluntary action by the defendant that affords the plaintiff all or some of the relief he sought through a judgment - *e.g.*, * * * a change in conduct that redresses the plaintiff's grievances. When that occurs, the plaintiff is deemed to have prevailed despite the absence of a formal judgment in his favor. See *Maher*, *supra*, 448 U.S., at 129 * * *.

The Court explained that the lower court's holding that the plaintiff's disciplinary proceeding was unconstitutional was insufficient because that finding had not "*affect[ed] the behavior of the defendant towards the plaintiff*" (emphasis in original). 482 U.S. at 761. In contrast, if "the defendant, under the pressure of the lawsuit, pays over a money claim before the judicial judgment is pronounced" or "alters his conduct (or threatened conduct) towards the plaintiff that was the basis for the suit." then "the plaintiff will have prevailed." *Ibid.*

Finally, in *Gwaltney*, the Court stated (484 U.S. at 67, n. 6):

> The legislative history of [33 U.S.C. 1365(d)] states explicitly that the award of costs "should extend to plaintiffs in actions which result in successful abatement but do not reach a verdict. For instance, if as a result of a citizen proceeding and before a verdict is issued, a

> defendant abated a violation, the court may award litigation expenses borne by the plaintiffs in prosecuting such actions." [S. Rep. No. 414, *supra*, p. 81].[27]

Thus, prior to *Farrar*, the Court had stated that it was "settled law" that a plaintiff has prevailed for purposes of fees when, in the absence of a court order or a settlement, a voluntary change in a defendant's conduct as a result of a lawsuit has redressed the plaintiff's grievances. *Hewitt*, 482 U.S. at 760-761. The Court also made clear that a change in conduct includes abatement of a Clean Water Act violation. *Gwaltney*, 484 U.S. at 67, n. 6.

Nonetheless, the court of appeals held below that *Farrar* had overruled the catalyst rule. It reached that conclusion even though *Farrar* did not state that it was overruling the catalyst rule and even though *Farrar* cited *Hewitt* and *Maher v. Gagne*

27/ The court of appeals implicitly, but clearly, admitted that its decision on attorneys' fees below was inconsistent with *Gwaltney*. It did so by prefacing its citation to *Gwaltney* with "*But see*." 149 F.3d at 307, n. 5 (Pet. App. 9a). Such a citation to an opinion of this Court by a court of appeals is, to say the least, unusual. The court of appeals' only explanation for doing so was to note that *Gwaltney* discussed the prior language of Section 505(d) of the Act, which authorized a court to award fees to any "party," rather than the language of the 1987 amendment to Section 505(d), which added "prevailing or substantially prevailing" before "party." *Ibid.*

The legislative history of the 1987 amendment to Section 505(d) shows that the change in the language of Section 505(d) was intended merely to clarify Congress' intent that citizen plaintiffs not receive attorneys' fee awards when the plaintiffs had lost the litigation. S. Rep. No. 50, *supra*, p. 33; S. Rep. No. 233, 98th Cong., 1st Sess. 24-25 (1983); A Legislative History of the Water Quality Act of 1987, 100th Cong., 2d Sess., Sen. Print 144 (Nov. 1988), vol. 2, pp. 1311-1312 (remarks of Senator Chafee, the sponsor of the legislation). Since the "prevailing party" language is precisely the language interpreted by the Court in *Hanrahan v. Hampton*, *Maher v. Gagne*, and *Hewitt v. Helms*, the addition of that language cannot possibly mean that the catalyst rule no longer applies to fee awards under Section 505(d).

without indicating any disagreement with them. 506 U.S. at 110-111. As the Court of Appeals for the Seventh Circuit stated in *Zinn by Blankenship v. Shalala*, 35 F.3d 273, 276 (1994), it is "implausible that the Supreme Court meant to abolish a rule employed by nearly every circuit and previously recognized by the Court itself as 'settled law,' without expressly indicating that it was doing so."

In *Farrar*, the Court stated that "to qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim." 506 U.S. at 111. It stated further that, in order to prevail for the purpose of obtaining fees, "the plaintiff must obtain an enforceable judgment against the defendant from whom such fees are sought or comparable relief through a consent decree or settlement" (citations omitted). *Ibid.* The Fourth Circuit found that *Farrar* overruled the catalyst rule because it did not add *or voluntary action by the defendant* at the end of that sentence. *S-1 and S-2*, 6 F.3d at 168 (dissenting opinion adopted by majority *en banc*).

However, *Farrar* was not addressing the situation where a defendant had voluntarily changed its behavior in response to a lawsuit. Instead, it was discussing the nature of the relief that a plaintiff must receive in order to be a prevailing party for fees purposes. The Court stated (506 U.S. at 111):

> Whatever relief the plaintiff secures must directly benefit him at the time of the judgment or settlement. * * * Otherwise the judgment or settlement cannot be said to "affect the behavior of the defendant toward the plaintiff." [citation omitted]

When, as here, a defendant modifies its behavior in response to a lawsuit, the lawsuit has "affected the behavior of the defendant toward the plaintiff." Indeed, the Court has made clear that it is not a judgment itself that confers prevailing party status but a change in behavior by the defendant. In *Hewitt*, the Court stated that "[a]t the end of the rainbow lies not a

judgment, but some action (or cessation of action) by the defendant that the judgment produces--the payment of damages, or some specific performance, or the termination of some conduct." 482 U.S. at 761. In *Rhodes v. Stewart*, 488 U.S. 1, 4 (1988), the Court held that a party who wins a declaratory judgment prevails for fees purposes only if the judgment "affects the behavior of the defendant toward the plaintiff." Thus, the *sine qua non* of prevailing party status is not a judgment but a change in behavior by the defendant brought on by the lawsuit.

Plaintiffs here achieved exactly that. The fact that the relief plaintiffs obtained was vacated is irrelevant. This conclusion is particularly clear in this case since the vacation of the judgment occurred precisely because the suit had been successful in obtaining Laidlaw's compliance with the statute.

Ten other Circuits have found, either explicitly or implicitly, that the catalyst rule was not overturned by *Farrar*. *Maduka v. Meissner*, 114 F.3d 1240, 1241 (D.C. Cir. 1997); *Marbley v. Bane*, 57 F.3d 224, 234 (2d Cir. 1995)("*Farrar* does not eviscerate the long-standing doctrine that a plaintiff who has obtained at least some part of what he sought in bringing the suit may be considered a prevailing party"); *Kilgour v. City of Pasadena*, 53 F.3d 1007, 1010 (9th Cir. 1995)("*Farrar* does not preclude a catalyst test"); Zinn, 35 F.3d at 274-276 (quoted at p. 47 above); *Beard v. Teska*, 31 F.3d 942, 951-952 (10th Cir. 1994)("we * * * have not agreed [that *Farrar* rendered the catalyst theory nonviable]"); *Baumgartner v. Harrisburg Housing Auth.*, 21 F.3d 541, 546-550 (3d Cir. 1994)("We believe it is not likely that the Supreme Court [in *Farrar*] would overturn such a wide-spread theory without even mentioning it, particularly when it was inapplicable to the case at hand"); *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist.*, #1, 17 F.3d 260, 262-263 and n. 2 (8th Cir. 1994)("We decline to extend *Farrar*'s language beyond its context of

determining prevailing party status after a final determination on the merits"); *American Council of the Blind v. Romer*, 992 F.2d 249, 250-251 (10th Cir. 1993)("It does not appear that the decision in *Farrar* condemns the use of the 'catalyst rule' in a nonjudgment on the merits situation"); *Craig v. Gregg County, Texas*, 988 F.2d 18, 20-21 (5th Cir. 1993)("A more precise reading of *Farrar*, however, might suggest that a party may prevail, even in the absence of a judgment, consent decree, or direct personal benefit 'if its ends are accomplished as a result of the litigation'" (citation omitted)); *Paris v. HUD*, 988 F.2d 236, 240-241 (1st Cir. 1993); *Citizens Against Tax Waste v. Westerville City Sch.*, 985 F.2d 255, 257-258 (6th Cir. 1993).

The fees provision of the Clean Water Act was intended by Congress to induce attorneys to bring these cases: "[t]he Courts should recognize that in bringing legitimate actions under this section citizens would be performing a public service and in such instances, the courts should award costs of litigation to such party. S. Rep. No. 414, *supra*, p. 81. *See also SPIRG v. AT&T Bell Lab.*, 842 F.2d 1436, 1449 (3d Cir. 1988). The decision of the court below deeply undermines this inducement. It means that, even when the litigation is fully successful, it will often result in no compensation to the plaintiff's attorney. Such a result is not only obviously unfair but directly contrary to Congress' intent.

Indeed, the court of appeals' position would have a serious impact not only on citizen suits under environmental statutes but also civil right suits and other suits brought under fees-shifting statutes. As this case illustrates, enforcement suits under the Clean Water Act and other environmental statutes are major, complex litigation requiring a substantial commitment of time by attorneys and expert witnesses. The same is true of civil right suits. Since individual and non-profit organizational plaintiffs rarely have such resources, most such suits are brought by attorneys who will be compensated solely by fee

awards against the defendant if the suits are successful. Few lawyers would be willing to bear large costs in the form of expert witness' fees and their own uncompensated time only to find that the suit has led the defendant to comply with the statute and therefore, for this very reason, the case must be dismissed without any award of attorneys' fees or expenses. Attorneys who practice under fee-shifting statutes take on the risk of not being paid when they lose. It is unlikely that they will be able to bear the additional risk of not being paid even when they are fully successful.

In short, the decision below is contrary to decisions of this Court recognizing the catalyst rule, the decisions of ten other circuits holding that the catalyst rule survived *Farrar*, congressional intent, and sound public policy. As a result, it should be reversed.[28]

CONCLUSION

It is respectfully submitted that the decision of the court of appeals be reversed and the case be remanded for consideration of the issues presented in the parties' appeals to that court.

Respectfully submitted,
Bruce J. Terris
Carolyn Smith Pravlik
Monica Wagner
James S. Chandler, Jr.

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[28] The ruling on fees should be reversed even if this Court also reverses the ruling on mootness. As a result of its decision on mootness, the court of appeals did not rule on Laidlaw's arguments regarding standing and diligent prosecution by the State. *See* 149 F.3d at 305, 307 (Pet. App. 5a, 9a). If plaintiffs are successful on mootness but ultimately lose based on Laidlaw's other arguments, the court of appeals' decision on fees will preclude reimbursement of these fees. Since the attorneys' fees issue will have been fully briefed and argued, it would be an appropriate exercise of the Court's discretion to decide the issue. *See Bennett v. Spear*, 117 S. Ct. at 1163.

APPENDIX

Article III of the Constitution of the United States

* * *

Section. 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

* * *

Supreme Court, U.S.
FILED
JUN 9 1999
CLERK

No. 98-822

IN THE
Supreme Court of the United States

FRIENDS OF THE EARTH, *et al.*,
Petitioners,

v.

LAIDLAW ENVIRONMENTAL SERVICES (TOC), INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

SUGGESTION OF MOOTNESS

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Dated: June 9, 1999

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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IN THE

Supreme Court of the United States

No. 98-822

FRIENDS OF THE EARTH, *et al.*,
Petitioners,

v.

LAIDLAW ENVIRONMENTAL SERVICES (TOC), INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

SUGGESTION OF MOOTNESS

Pursuant to Rule 21 of the Rules of this Court, Respondent Laidlaw Environmental Services (TOC), Inc. ("Laidlaw") respectfully suggests that this case has become moot and that the Writ of Certiorari should be dismissed. This issue of mootness is in addition to the substantive issues of standing and mootness already before the Court. Petitioners raised the specific issue in their brief of whether closure of Respondent's facility moots the case. The Petitioners did so, however, without support in the record, thereby precipitating this submission in order to provide the Court with additional facts necessary for an evaluation of this issue. Respondent further respectfully requests that the Court suspend the remainder of the briefing schedule pending the Court's disposition of this Suggestion.

BACKGROUND

The questions presented in this case pertain to the issue of whether a citizens group has standing to bring a citizens suit under Section 505 of the Clean Water Act, 33 U.S.C. 1365(a), and whether that suit becomes moot because the remedy sought—civil penalties—will not redress the alleged injury pursuant to this Court's decision in *Steel Company v. Citizens for a Better Environment*, 523 U.S. 83 (1998). The question of a citizen plaintiff's entitlement to attorneys' fees or litigation costs in a moot case is also before this Court.

These questions arise out of a citizens suit filed by Petitioner[1] Friends of the Earth ("FOE") on June 12, 1992 against Respondent Laidlaw claiming injury caused by Laidlaw's alleged ongoing violations of a National Pollutant Discharge Elimination System ("NPDES") permit that regulated wastewaster discharges from an incinerator at Laidlaw's Roebuck, South Carolina facility. The district court found that, although Laidlaw had made good faith efforts to achieve compliance prior to the filing of the complaint, and that no harm to the environment had been caused by the permit violations, Laidlaw should pay a statutory penalty of $405,000.00 for NPDES permit violations occurring mostly before and, in a few minor circumstances, after the institution of the lawsuit. *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 956 F. Supp. 588, 610 (D.S.C. 1997) (J.A. 180-181). Injunctive relief was denied in its entirety. *Id.* at 611 (J.A. 183). On appeal, FOE abandoned its request for injunctive relief and sought only an

[1] The other Petitioners, Sierra Club and CLEAN, Inc., were allowed to join the citizens suit several months later (by which time Laidlaw was in substantial compliance) despite the fact that neither filed the 60-day notice letter required by the Act, 33 U.S.C. 1365(b).

increase in the statutory civil penalties. The Fourth Circuit reversed, holding that under this Court's ruling in *Steel Company v. Citizens for Better Environment* the case had become moot because civil penalties—which are payable to the U.S. Treasury and not to citizen plaintiffs—would not redress any injury claimed to have been suffered by the Petitioners as a result of alleged ongoing NPDES permit violations. *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 149 F.3d 303, 306-07 (4th Cir. 1998).

After the Fourth Circuit issued its decision on July 16, 1998 but before this Court granted *certiorari*, NPDES discharges at the Roebuck, South Carolina facility were *permanently* discontinued at 7:00 a.m. on September 1, 1998 (*see* Affidavit of Roebuck Environmental Manager Charisse G. McLeod, attached to this submission). Subsequently, the entire facility was permanently closed. *Id.*

ARGUMENT

Permanent Closure of the Facility Has Mooted this Case

A case is moot, and cannot be maintained, when " 'there is no reasonable expectation that the wrong will be repeated.' " *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 66 (1987), *quoting United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953).

Respondent's permanent closure of the Roebuck facility at issue in this case rendered the case moot because no actual "case or controversy" continued to exist between the parties. Article III standing requires both an "injury in fact—an invasion of legally-protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical," and that the injury is capable of being "redressed by a favorable deci-

sion." *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (internal quotations omitted). A plaintiff must be able to establish the standing requisites of injury in fact, causation, and redressability at each stage of the litigation. *Id.* Here, the alleged injury that was the subject of the Petitioner's complaint—ongoing and future violations of Respondent's NPDES permit due to incinerator wastewater discharges at the Roebuck facility —no longer exists, and cannot reasonably be expected to recur. The discharge has stopped entirely and the facility is closed. The injury is no longer "actual or imminent." *See Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983) ("past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects"), *citing O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974).

Petitioners attempt to address the issue of whether the facility closure moots this case by making three unsupported and illogical arguments in their brief on the merits. First, Petitioners assert that since the NPDES permit is still in effect, Laidlaw "may discharge in the future whenever it cares to do so." (Brief For Petitioners, p. 8, n.7). As clearly demonstrated by the Affidavit of the Roebuck facility's Environmental Manager, Charisse G. McLeod, Petitioners' assertion is incorrect—the incinerator that generated the wastewater discharged under the NPDES permit has been removed and discarded. In fact, the entire facility is closed and most of the equipment has been dismantled and sold or discarded. (McLeod Affidavit).

Second, Petitioners imply that Laidlaw's retention of its NPDES permit indicates Laidlaw's intent to engage in future NPDES discharges. (Brief For Petitioners, p. 8, n.7). As shown by Ms. McLeod's affidavit, however, the

NPDES permit was kept in effect to make the Roebuck site more attractive to a prospective purchaser, not in contemplation of any future NPDES discharges by Laidlaw. Moreover, Ms. McLeod's affidavit references and incorporates a Consent Agreement, dated June 2, 1997, entered into between Laidlaw and the South Carolina Department of Health and Environmental Control (DHEC) that reflects, in pertinent part, that Laidlaw shut down the incinerator for economic reasons and that any violation of the Agreement would be deemed a violation of state law.

Third, Petitioners assert that even the permanent closure of the facility would not moot the case because they have members affected by alleged, but unidentified, Safety Kleen/Laidlaw NPDES discharges at other affiliated corporations. (*See* Brief For Petitioners, p. 8, n.7). This assertion borders on the frivolous. No facts are provided in support of this allegation. More fundamentally, the case before this Court involves past NPDES permit violations *only* at Respondent's facility located in Roebuck, South Carolina. Respondent Laidlaw Environmental Services (TOC), Inc. has no other facilities. Understandably, Petitioners cite no authority for the proposition that mootness can be avoided by claiming a possible deterrent effect that penalties imposed on *one* company might have on *another* company not in the lawsuit and not alleged to be in violation of any permit.

Laidlaw invites the Court's attention to the position taken in this case by the United States as *amicus curiae*, at page 15 of its brief, that "a defendant's voluntary cessation of permit violations does not moot a citizens suit *unless the defendant demonstrates that the permit violations will not recur.*" (Emphasis added). The permanent closure of the facility, as described in Ms. McLeod's affi-

davit, demonstrates just that. In fact, the United States, in taking the same basic position in its brief opposing *certiorari* in another case, predicted this exact scenario, and a corresponding finding of mootness:

> In the case of Clean Water Act citizens suits, the commencement of compliance, even if accompanied by the initiation of new procedures or the installation of new equipment, would not, as a general matter, completely moot a case because, for example, the same neglectful behavior that led to the violations may still recur in the form of neglectful adherence to the new procedures or neglectful operation and maintenance of the new equipment. Accordingly, we submit, a finding of mootness would generally be inappropriate absent a showing that the prospect of neglectful behavior itself is eliminated by, for example, *the permanent closing of the facility or the permanent cessation of all discharges. See, e.g., Pawtuxet Cove Marina, Inc. v. Ciba-Geigy Corp.*, 807 F.2d 1089 (1st Cir. 1986), *cert. denied* 108 S. Ct. 484 (1987) (defendant completed tie-in with the municipal treatment facility and ceased discharging under its NPDES permit). In the absence of such a showing, Article III standing would continue as well.
>
> *Simkins Industries, Inc. v. Sierra Club*, No. 88-660 (October Term, 1988), Brief for the United States as Amicus Curiae, at pages 11-12, n.11. (Emphasis added).

It is clear that the facts of this case satisfy even the Solicitor General's stringent standard for establishing mootness. Here, Laidlaw permanently closed, dismantled, and put the Roebuck facility up for sale for economic reasons. Laidlaw's consideration of this course of action was reported in the South Carolina press as early as January 28, 1997. (*See* "Laidlaw Mulling Options," attached

to this submission). By June 2, 1997—when Laidlaw and DHEC executed a Consent Agreement—the final decision had been made. These facts make it patently clear that the closure decision was not a ruse to avoid this Court's review of the Fourth Circuit's July 16, 1998 decision.

CONCLUSION

This case became moot prior to the grant of the Petition for Writ of Certiorari and, accordingly, the Writ should be dismissed, and the Fourth Circuit decision allowed to stand, because the Court had "no constitutional power to decide the merits" when it acted on the petition. *U.S. Vancorp v. Bonner Mall Partnership*, 513 U.S. 18, 27 (1994). The Respondent further requests that this Court suspend the remainder of the briefing schedule in this case pending its disposition of this Suggestion of Mootness.

Respectfully submitted,

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Dated: June 9, 1999

APPENDICES

APPENDIX A

Spartanburg Herald Journal—1-28-97

LAIDLAW MULLING OPTIONS

Incinerator talking closure with DHEC

By GARY HENDERSON
Staff Writer

A Laidlaw Environmental Services official said Monday the company is considering shutting down its Roebuck incinerator because the facility is producing "poor financial results."

Henry Taylor, vice president of legal and regulatory affairs, said the plan to close the incinerator could be worked out with state officials by February.

But it will be much longer before the incinerator actually stops operating.

"It might take a year, but certainly less than two years," Taylor said.

The decision about the possible shutdown of the incinerator came during negotiations with S.C. Department of Health and Environmental Control over Laidlaw's operating permit, Taylor said.

Laidlaw is currently permitted to burn 4.5 tons of hazardous waste per hour year around. During the permit process, samples of gases being emitted from a trial burn of the incinerator must be submitted to the state's health authorities.

"There was a dispute about the capacity we could burn," Taylor said. "They wanted to go down to 3.7 tons, and they didn't think we provided quality samples. We felt we did."

Taylor said Laidlaw officials then decided to approach DHEC about closing the incinerator.

"I think they were happy to see us come with the idea," Taylor said, "but they were shocked."

Taylor said it is difficult to make a profit at the Roebuck facility because there are so many incinerators operating in the United States. He said kilns used for making cement now burn hazardous materials as fuel, reducing the demand for incinerators even further.

"It is highly competitive," Taylor said. "There is a real over-capacity—more incinerators than there is material to burn."

Taylor said if the incinerator closes, Laidlaw would still use the Roebuck site as a transfer and holding facility.

"This would become a collection point for small quantities that would be combined and shipped to another incinerator site," Taylor said.

Dever Melton, a Roebuck resident who has worked with other community activists to get the Laidlaw incinerator shut down, said he wants the entire facility closed.

"We will not be satisfied until there are no more toxic chemicals brought to Roebuck," Melton said, "We will not be satisfied until they stop hauling the stuff down the road or bringing it in on the rail cars."

Taylor said that if the incinerator is shut down, the facility's work force of 48 employees would probably be reduced.

"We don't have a feel for that yet," Taylor said, "We will need some different skills from the ones we have now, but the people working there will have an opportunity to continue working with Laidlaw."

Hazardous wastes are shipped to the Spartanburg County facility from more than 40 states. Laidlaw, a Canadian-

based company, operates collection and transfer sites in 11 states and in Canada.

A merger between Laidlaw and Rollins Environmental was announced earlier this month, which would give the merged company 120 facilities. Rollins Environmental is a New Jersey-based hazardous waste management company.

'We will not be satisfied until there are no more toxic chemicals brought to Roebuck.'

Dever Melton

Taylor said the merged company has 120 facilities around the country, which will probably be reduced to 100.

Explosions have occurred twice at the Roebuck plant in the last five months after several types of hazardous waste were transferred to a holding tank.

Officials evacuated eight homes in the area last week and advised residents of another 65 homes to stay inside after a 500-gallon tank exploded. The explosion emitted a large cloud of sulfurous vapors, which the wind blew about one-half mile from the site.

"If we have caused any fears or concern among the citizenry, we hope it will vanish," Taylor said. "We want our operation to be one that protects the people and the environment. It will continue to be."

Taylor said the negotiations with DHEC about the incinerators will continue.

"It's not final, even though we are moving in that direction," Taylor said.

APPENDIX B

IN THE SUPREME COURT
OF THE UNITED STATES

No. 98-822

FRIENDS OF THE EARTH, INC.,
Petitioners

v.

LAIDLAW ENVIRONMENTAL SERVICES (TOC), INC.,
Respondent

AFFIDAVIT

1. My name is Charisse G. McLeod and I am employed by Safety-Kleen Systems, Inc. (formerly Laidlaw) as the Environmental Manager at Safety-Kleen/Laidlaw's former hazardous waste treatment, storage and disposal facility at 301 Railroad Street, Roebuck, South Carolina 29376.

2. Past operations at the Roebuck facility included a liquid injection incinerator which was used to incinerate hazardous waste. This incineration process created wastewater which was passed through a wastewater treatment system and thereafter discharged into the North Tyger River pursuant to an NPDES permit issued by the South Carolina Department of Health and Environmental Control (DHEC).

3. On June 2, 1997, Laidlaw and DHEC entered into a consent agreement which provided, among other things, that Laidlaw would cease operation of the liquid injection

incinerator no later than August 31, 1998. A copy of that consent agreement is attached to my affidavit as Exhibit 1 and incorporated and made a part of this affidavit.

4. Pursuant to the terms of that consent agreement, Safety-Kleen/Laidlaw submitted a closure plan for the incinerator to DHEC which was approved by DHEC on September 15, 1998. Additionally, Safety-Kleen/Laidlaw decided to discontinue all operations at the Roebuck facility and the closure plan for the remaining operations was approved by DHEC on April 13, 1999.

5. At present, the entire facility is permanently closed and for sale. The incinerator which generated the wastewater that was discharged to the North Tyger River pursuant to Safety-Kleen/Laidlaw's NPDES permit has been removed and discarded, as have all waste feed systems from the tanks to the incinerator. The first and third stages of the wastewater treatment system have been removed and/or sold. Only the second stage (the Lancy metals removal system and filter press) remain and they are for sale. The last discharge under the NPDES permit was at 7:00 a.m. on September 1, 1998, and no customer waste was received after August 31, 1998. Whenever possible, we helped customers locate alternative disposal sites. Approximately 60 employees have been terminated and no employee who operated the wastewater treatment system is currently on site. In fact, there are only five employees (including myself) physically present at the Roebuck site and all five employees report out of the Company's headquarters in Columbia, South Carolina.

6. It would be unlawful to discharge water to the North Tyger River under the NPDES permit and Safety-Kleen/Laidlaw has no intention of doing so. More practically, it would be impossible to do so because most of

the system (including the incinerator) has been dismantled and discarded or sold.

7. I have been shown footnote 7 at page 8 of the Petitioner's Brief in *Friends of the Earth, et al. v. Laidlaw Environmental Services (TOC), Inc.*, No. 98-822, where it is stated that "since Laidlaw's NPDES permit is still in effect, it may discharge in the future whenever it cares to do so." That is simply incorrect. It is impossible to discharge wastewater at the Roebuck facility under the NPDES permit since there is no waste to incinerate and no incinerator to generate wastewater.

8. Safety-Kleen/Laidlaw took steps to keep the NPDES permit in effect because to do so might make the site more attractive to a prospective purchaser. The permit has not been kept in effect in contemplation of any future NPDES discharges by Safety-Kleen/Laidlaw.

Dated this 21st day of May, 1999.

/s/ Charisse G. McLeod
CHARISSE G. MCLEOD

[Notary Omitted]

APPENDIX C

THE STATE OF SOUTH CAROLINA
BEFORE THE DEPARTMENT OF HEALTH
AND ENVIRONMENTAL CONTROL

IN RE:
LAIDLAW ENVIRONMENTAL SERVICES (TOC), INC.
SCD 981 467 616
BAQ PERMIT No. 2060-0064
Spartanburg County

CONSENT AGREEMENT
97-15-HW
97-43-A

This Consent Agreement is being entered into by the South Carolina Department of Health and Environmental Control, hereafter the Department, and Laidlaw Environmental Services (TOC), Inc., a South Carolina corporation, pursuant to the Department's authority under 25 S.C. Code Ann. Regs. 61-79 (Supp. 1996), promulgated pursuant to the South Carolina Hazardous Waste Management Act, S.C. Code Ann. § 44-56-10 *et seq.* (Supp. 1996) and the South Carolina Pollution Control Act § 48-1-10 *et seq.*, 1976, as amended.

FINDINGS OF FACT

1. Laidlaw Environmental Services (TOC), Inc., hereafter TOC, USEPA ID No. SCD 981 467 616, operates a commercial hazardous waste treatment, storage and disposal facility in Spartanburg County, South Carolina.

The local address of the facility is 301 Railroad Street, Roebuck, South Carolina 29376. State regulations authorize the facility to manage hazardous waste. In November 1980 the facility received interim status under the Resource Conservation and Recovery Act (RCRA). On September 30, 1988, the Department's Bureau of Solid and Hazardous Waste Management (BSHWM) issued a Part B permit to the facility and the U.S. Environmental Protection Agency (USEPA) issued a Hazardous and Solid Waste Amendments (HSWA) permit to the facility. The Part B permit issued by the Department was modified in 1991 to require post-closure care of closed hazardous waste surface impoundments and to include additional waste codes. The Part B permit has not become effective because of appeals by the permittee and others. Consequently, the facility operates under interim status. The HSWA permit has become effective and has been amended several times.

2. The Department's Bureau of Air Quality (BAQ) issued Air Construction Permit No. 2060-0064-CA on December 12, 1985 to TOC. The Construction Permit authorized the modification and operation of a hazardous waste incinerator system with an incineration capacity of 4.5 tons per hour. On November 21, 1990, the BAQ issued Air Operating Permit No. 2060-0064 to TOC. The Operating Permit was appealed and has not become effective. On December 15, 1996, TOC submitted a Title V Air Operating Permit Application to the BAQ. This application is currently under review.

3. Operations at the facility include a liquid injection incinerator with a steam generating boiler system and air and water pollution control systems. The incinerator has an interim status thermal destruction treatment limit of 4.5 tons per hour. The air pollution control system for

the incinerator includes a baghouse and a wet scrubber. Other equipment at the facility is controlled by either carbon absorption units or is subject to emission limits established to comply with South Carolina Air Pollution Control Regulation 61-62.5, Standard Number 8. The water pollution control system is a scrubber waste water treatment system composed of a pH adjuster, Lancy unit, carbon adsorption and other types of filtration. The facility has been determined by the BSHWM to have 839,500 gallons of tank storage capacity and 64,230 gallons per day of treatment in tank capacity. Presently, the facility has 48,840 gallons of interim status container storage capacity.

4. On January 16, 1986 when TOC was purchased from its prior owner, the site had groundwater contamination believed to have been caused by contamination from several ponds or surface impoundments previously operated at the site. TOC entered into a 3008(h) RCRA Corrective Action Order with the USEPA to address the contamination. TOC has constructed and installed a system to remediate affected groundwater. This system will be operated until all statutory and regulatory requirements with respect to corrective action are achieved.

5. It is TOC's position that marketplace realities have had a significant effect on the commercial success of incineration activities at TOC. Many of the hazardous and nonhazardous liquid waste streams that can be incinerated at TOC are now being burned at cement kilns and other boilers and industrial furnaces. This competitive incineration market has driven pricing below that level which can profitably support the high costs associated with the operation of a RCRA regulated incinerator at the Roebuck, South Carolina location.

6. After making its marketplace analysis, TOC informed the Department's Bureau of Land and Waste Management, formerly known as the Bureau of Solid and Hazardous Waste Management (BSHWM), that it desired to modify its operational platform at the facility. To effect this result, TOC submitted a revised Part A application on April 10, 1997. The revised Part A application was approved by the Department on April 17, 1997.

7. Of the 839,500 gallons of interim status tank storage capacity (S02) referenced in paragraph 3 above, to date 547,780 gallons of tank storage capacity has been constructed. The remaining 291,720 gallons of tank storage capacity has not been constructed. TOC desires to operate additional container storage capacity (S01) equal to the as yet unconstructed tank storage capacity.

8. TOC desires to convert the incineration capacity (T03) of 4.5 tons per hour to an equivalent amount of treatment capacity defined by the process codes of T01, treatment in tanks, and T04, other treatment.

9. Since the issuance date of Air Construction Permit Number 2060-0064-CA, the facility has complied with state emission limits during source evaluations as required by the Construction Permit and by South Carolina Air Pollution Control Regulation 61-62.5, Standard Number 3. The facility has obtained additional construction permits for a replacement baghouse and other new air emission control devices.

10. Upon execution of this Agreement, TOC is willing to initiate the design and subsequently the construction of a new traffic route to the facility.

11. TOC has outstanding matters which involve the USEPA. On September 29, 1994 TOC executed a 3013

Order with USEPA. To date, this Order has not been modified. TOC also has a HSWA permit renewal application pending with USEPA, Region IV.

NOW, THEREFORE, IT IS AGREED pursuant to S.C.Code Ann. §§ 44-56-40, *et seq.* (Supp. 1995) and the South Carolina Pollution Control Act § 48-1-10 *et seq.*, 1976, as amended, that:

1. TOC shall cease operation of the liquid injection incinerator no later than August 31, 1998. Until that date, TOC may continue to operate the incinerator provided that all regulatory requirements for operation of the incinerator are met.

2. Nothing in this Consent Agreement will excuse TOC from complying with all applicable generator and interim status treatment, storage, and disposal facility operating regulations, as well as, any other state and federal environmental regulations and permitting requirements.

3. As of August 31, 1998, TOC will no longer have interim status for treatment of waste by incineration (T03). The 4.5 tons per hour of incineration capacity may be converted to an equivalent amount of treatment capacity which is defined by the process codes, T01, treatment in tanks, and T04, other treatment, provided that a process design proposal from TOC is approved by the Department. The Department recognizes that TOC would like to complete construction of the converted treatment capacity before the date it surrenders its interim status incineration capacity and will therefore review the process design proposal in a timely manner. The process design proposal shall consist of a description of the proposed process design and the calculated caacity as derived from all or part of the 4.5 tons per hour of incineration capacity. The cumulative total of the converted treatment capacity, which shall consist of fuels blending, shredding,

stabilization/solidification, and metals precipitation, shall not exceed the equivalent of 4.5 tons per hour. The converted treatment capacity may be utilized in addition to the existing 64,230 gallons per day of approved treatment in tank capacity (T01) or utilized in whole or part for other treatment (T04). TOC may construct the equivalent treatment capacity after the effective date of this agreement, receipt of approval of the process design proposal, and receipt of the appropriate permits from other entities including, but not limited to, the BAQ. All changes to the faciilty pursuant to this Agreement must comply with R.61-79.270.72(b) which refers to reconstruction. TOC can not use this newly constructed equivalent capacity until it ceases to operate the incinerator and compliance with R.61-79.270.72(b) is demonstrated.

4. No later than 60 days from the execution date of this Agreement, TOC shall submit to the Department's Bureau of Land and Waste Management a closure plan for the liquid injection incinerator, boilers, the stack, baghouse, induction fan and associated duct work, venturi quench and wet scrubber. The plan shall satisfy the applicable requirements of R. 61-79.265 Subpart G.

5. No later than 180 days from the execution date of this Agreement, TOC shall submit to the Department's Bureau of Land and Waste Management a revised Part B permit application for the facility consistent with the Part A application approved by the Department on April 17, 1997 and the Part B application will not include a request to operate an incinerator. Any interim status incineration capacity included in this permit application will be terminated.

6. No later than August 31, 1998, TOC will withdraw its appeal of the BAQ November 21, 1990, air permit decision.

7. TOC shall submit to the Department's Bureau of Land and Waste Management quarterly progress reports discussing how the 291,720 gallons of unconstructed tank storage capacity (S02) is being converted to container storage capacity (S01) and how the treatment capacity converted from the 4.5 tons per hour of incineration capacity is being established. The first progress report will be due September 1, 1997 and the final report will state how the converted tank storage capacity exists as container storage capacity and how the converted treatment capacity has been established. In no event will container storage under interim status exceed 340,560 gallons which represents the combination of 48,840 gallons of existing container storage capacity and the 291,720 gallons of unconstructed tank storage capacity.

8. Should TOC desire to change its operation methods to affect a source of air pollution, i.e., to install or modify control equipment or remove a source of air contamination from service, TOC shall submit a request for an air permit determination, or a request to modify the facility's Title V permit, and/or submit a construction permit application or such other appropriate authorization request. TOC shall not proceed with the change or addition without obtaining either a written response approving the request or without obtaining a construction permit in accordance with South Carolina Air Pollution Control Regulation 61-62.1, Section II, A, if necessary.

9. TOC shall continue to comply with all conditions and provisions of outstanding orders entered into with the Department and effective permits issued by the Department (including the BAQ Title V permit, if applicable) until otherwise authorized by the appropriate Department entity.

10. Within five (5) days of the execution date of this Agreement, TOC will provide the Department with notifi-

cation that it has contacted USEPA to confer with the Agency about the matters referenced in paragraph 11 of the Findings of Fact.

11. TOC shall advise the Department of the general location of the new traffic route and associated design and construction milestones within one hundred eighty (180) days of the execution of this Agreement.

12. The Department and TOC recognize that circumstances may arise which may affect due dates and deadlines set out in this Agreement. Should such circumstances arise, TOC shall notify the Department in writing, (fax transmission being acceptable) no later than fourteen (14) days after the discovery of the occurrence of any event which TOC would contend is a circumstance causing an unavoidable delay or need for a schedule adjustment. The written notification to the Department shall attempt to anticipate the length of delay, generally describe the cause or causes of the circumstance, and indicate the measures, if possible, to be taken by TOC to minimize the effect on any schedule. In the event the Department concurs that an unavoidable situation has occurred, this Agreement, including incorporated documents and any affected schedules, shall be modified in the event the unavoidable situation affects such schedules. Any such modifications or revised schedules shall be incorporated by reference as part of this Consent Agreement.

IT IS FURTHER AGREED that failure to meet deadlines established herein or any other violation of the provisions of this Agreement may be deemed a violation of the South Carolina Hazardous Waste Management Act and the South Carolina Pollution Control Act and therefore shall be deemed unlawful. Upon ascertaining any

such violation, the Department may initiate action to obtain compliance with this Agreement and the aforesaid Acts.

THE SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

Date: 6/2/97

By: /s/ Douglas E. Bryant
DOUGLAS E. BRYANT
Commissioner

We Consent:

LAIDLAW ENVIRONMENTAL SERVICES (TOC), INC.

Date: 5-30-97

By: /s/ [Illegible]

THE SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL

/s/ Hartsill W. Truesdale
HARTSILL W. TRUESDALE, P.E.
Chief
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Supreme Court, U.S.
FILED
JUL 19 1999
OFFICE OF THE CLERK

No. 98-822

(17)

IN THE
Supreme Court of the United States

FRIENDS OF THE EARTH, *et al.*,
Petitioners,
v.
LAIDLAW ENVIRONMENTAL SERVICES (TOC), INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Consistent with the requirements of Article III, can a private citizen maintain an appeal in which the only aspect of the judgment being appealed concerns the amount of a civil penalty payable solely to the United States Treasury?

2. In a case brought under the citizen suit provisions of Section 505 of the Clean Water Act, can the district court impose civil penalties payable solely to the United States Treasury even if it determines that the citizen-plaintiff is not entitled to any equitable relief, such as an injunction, in which it has a personal stake?

3. Notwithstanding the Clean Water Act's jurisdictional prohibition on a citizen suit if a state agency is diligently prosecuting compliance with a permit issued under the NPDES program (33 U.S.C. § 1365(b)(1)(B)), where the State has been active in seeking compliance, can a citizen-plaintiff meet the lack of diligent prosecution jurisdictional requirement by showing that the amount of civil penalties previously imposed by the State was insufficient?

4. Does a citizen-plaintiff have standing under Section 505 of the Clean Water Act and Article III of the Constitution to seek or obtain *any* relief in the absence of any demonstrated harm to the environment when, pursuant to a prior agreement with a state enforcement agency, the defendant previously committed to make "every effort" to achieve compliance, and in fact achieved substantial compliance within two months of the filing of the citizen suit?

5. Where a Clean Water Act citizen-plaintiff fails to obtain either a settlement, injunction, or declaratory relief that materially alters the legal relationship between itself and defendant, can it nonetheless be deemed a prevailing or substantially prevailing party for purposes of an award of attorneys' fees?

6. Can a Clean Water Act citizen-plaintiff recover attorneys' fees as a "catalyst" to the defendant's compliance with the Act where the defendant made commitments to a state agency to comply with the law prior to the suit and, as a result of the state agency's enforcement efforts, came into substantial compliance with all requirements of the Act within two months after the citizen-plaintiff filed its suit?

CORPORATE DISCLOSURE STATEMENT

On June 30, 1998, Respondent Laidlaw Environmental Services (TOC), Inc. changed its name to Safety-Kleen (Roebuck), Inc., which is wholly owned by its parent, Safety-Kleen Services, Inc. (formerly known as LES, Inc.), which is wholly owned by its parent, Safety-Kleen Corp. (formerly known as Laidlaw Environmental Services, Inc.), which is a publicly held corporation traded on the New York Stock Exchange and the Pacific Stock Exchange.

Laidlaw Finance (Barbados), Ltd. is the only corporation that owns 10% or more of the stock of Safety-Kleen Corp. It is wholly owned by its parent, Laidlaw Investment, Ltd., which is wholly owned by its parent, Laidlaw, Inc., which is a publicly held corporation traded on the New York Stock Exchange, the Toronto Stock Exchange, and the Montreal Stock Exchange.

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STATEMENT OF THE CASE

Petitioners are private parties who brought a citizen suit under Section 505 of the Clean Water Act ("CWA" or "Act"). They sought an injunction and the imposition of civil penalties to prevent what they alleged was continuing harm to themselves as a result of Respondent Laidlaw's violations of an NPDES permit at a hazardous waste incineration facility.

The district court rejected Petitioners' prayer for preliminary and permanent injunctive or other equitable relief in light of the lack of harm to the environment and Laidlaw's persistent and successful efforts to comply with its permit. At Petitioners' request, however, the district court evaluated the adequacy of civil penalties previously imposed by the State of South Carolina in an enforcement proceeding and determined that those state-imposed penalties—in which Petitioners had no cognizable legal interest or personal stake—should be increased. The district court's determination that the penalties previously imposed by South Carolina were inadequate was the linchpin for its assertion of jurisdiction. Given the denial of any equitable relief and the imposition of a civil penalty payable solely to the United States Treasury, the district court's judgment did not provide *any* relief that benefited Petitioners.

On appeal, Petitioners did not challenge the district court's denial of their prayer for equitable relief. Instead, they focused solely on the amount of civil penalties imposed by the district court. With the ostensible appellants addressing only the amount of fees payable to the United States, and not seeking *any* redress for *themselves*, the court of appeals dismissed the appeal and vacated the judgment. The Fourth Circuit correctly concluded that this action could not be continued on appeal by parties possessing no cognizable interest in the outcome. The court of appeals declined to resolve on the merits the various issues presented regarding the proper amount of

a civil penalty imposed by a state or a federal court in a Clean Water Act case.

The detailed history of this case is set forth in extensive findings made in two opinions issued by the district court. Order of April 7, 1995 (JA 84-137), 890 F. Supp. 470, and Order of January 22, 1997 (JA 138-97), 956 F. Supp. 588.

Laidlaw's 1987 NPDES Permit

Laidlaw's NPDES permit for effluent discharges into the North Tyger River became effective in January 1987. With that permit, the South Carolina Department of Health and Environmental Control ("DHEC") imposed a "dramatic reduction" in the mercury discharge limit from 20 parts per billion ("ppb") to 1.3 ppb. Laidlaw was given one year to achieve the new limit and directed to determine whether it was technically possible to do so. The permit allowed Laidlaw to request a higher mercury limit upon completion of feasibility studies. JA 86-88.

Accordingly, Laidlaw hired Environmental Technology Engineering, Inc. ("ETE") to conduct a feasibility study. JA 88. ETE concluded that meeting the 1.3 ppb limit would be "an 'extremely difficult and complex problem' inasmuch as all available manufacturer's information and reliable equipment on the market demonstrated that current technology was capable of reducing mercury only down to a range of 2 ppb to 5 ppb." JA 143. ETE recommended installation of a second carbon adsorption unit. Laidlaw installed the unit in 1988 and elected not to seek a higher mercury limit. JA 88. The district court found that Laidlaw would "have been justified in returning to DHEC to seek a higher limit. . . . Instead Laidlaw elected a more difficult and costly path. . . . In sum, all parties involved knew that it would be a daunting task to go from 20 ppb to 1.3 ppb but Laidlaw elected to try." JA 177-78.

DHEC's 1988 Enforcement Action

Despite the second carbon adsorption unit, Laidlaw's facility failed to achieve consistent compliance with the 1.3 ppb mercury limit. DHEC responded with an investigation, initiation of an administrative enforcement action, and entry of a consent order on September 7, 1988. The consent order required, *inter alia*, that Laidlaw investigate new treatment technologies, and imposed a $20,000 civil penalty. JA 88.

To comply with the consent order, Laidlaw retained another firm, RMT, Inc. Under DHEC supervision, Laidlaw and RMT tested three potential solutions. The results showed that the Lancy system was most likely to achieve permit limits for all metals, including mercury. The Lancy system was constructed and operational by February 1991. JA 89.

The new system brought Laidlaw into complete compliance with all discharge limits for all metals other than mercury. JA 89. Laidlaw responded by making operational adjustments to the Lancy system. The manufacturer of the system, U.S. Filter, ultimately concluded that it might be impossible for the Lancy system to achieve consistent discharges below the 1.3 ppb level. Therefore, on June 26, 1991, Laidlaw filed a request with DHEC for a higher mercury discharge limit. Nonetheless, through the remainder of 1991 and into 1992, Laidlaw continued to seek some method of achieving the 1.3 ppb mercury level. JA 89-90, 146.

DHEC's 1992 Enforcement Action

After a series of abnormally high mercury excursions in December 1991, DHEC began considering an enforcement action against Laidlaw. On April 10, 1992, Petitioner Friends of the Earth sent a letter to Laidlaw, EPA and DHEC stating an intent to file a citizen suit after sixty days. On May 21, 1992, DHEC served a formal enforce-

ment document on Laidlaw. On June 5 and 8, 1992, DHEC and Laidlaw negotiated a consent decree. JA 90-91, 146. The consent decree, aproved by the Court of Common Pleas, Spartanburg County, South Carolina: (1) required payment of a "civil penalty" in the amount of $100,000 "[f]or all permit violations occurring up to the date of execution of th[e] Consent Order"; (2) required Laidlaw to "use every effort . . . to achieve compliance with the limitation for mercury in its permit"; (3) subjected Laidlaw "to additional enforcement action" for "[f]ailure . . . to comply with the terms and conditions of th[e] Consent Order"; and (4) terminated only if and when Laidlaw achieved compliance with its current or any new permit. JA 76-83, 97.

Pursuant to the decree, Laidlaw continued to explore technologies to remedy its mercury problems, and shut down its incinerator for substantial periods in July, August, September, and November 1992 "in an effort not to violate either its mercury parameter or the judicial consent order with DHEC." JA 92. By August 1992, Laidlaw's own personnel finally achieved substantial compliance with Laidlaw's mercury limit. JA 92, 147, 155, 183. On August 6, 1993, after an extended period of permit compliance, DHEC notified the state court that Respondent had complied with the consent decree, which could then expire. JA 93.

Petitioners' Federal Court Complaint

On June 12, 1992, Friends of the Earth filed this action in the district court under Section 505 of the Clean Water Act. JA 91. Petitioners complained about a variety of alleged violations of effluent limitations, and of monitoring and reporting requirements. JA 37-38. Petitioners acknowledged that DHEC had commenced a civil action concerning the violations alleged in the complaint, but asserted that action "was not diligently prosecuted" because, *inter alia,* the resulting consent decree "provided

inadequate remedies for defendant's violations of its permit." JA 29-30. The district court denied Petitioners' motion for a preliminary injunction on December 14, 1992. JA 53-65.

The District Court's "Diligent Prosecution" Order

Laidlaw sought dismissal of the suit on the jurisdictional grounds that the State's prior enforcement action constituted a "diligent prosecution."[1] 33 U.S.C. § 1365(b)(1)(B). In October and November 1992, the district court heard seven days of testimony on the "diligence" question. On April 7, 1995, it denied Laidlaw's motion and largely embraced Petitioners' theory that DHEC's lack of diligence in seeking compliance could be discerned from its failure to exact what the district court considered a sufficient penalty for past violations. *See* JA 99-106, 121-35. The court found "most persuasive" Petitioners' theory that in imposing a $100,000 penalty, DHEC "failed to recover, or even to calculate, the economic benefit that Laidlaw received by not complying with its permit." JA 121.[2] The district court accepted Petitioners' theory in this respect even though it "agree[d] that no language in the CWA directly requires a state enforcement agency to calculate economic benefit when determining what an appropriate civil penalty should be," and despite that neither DHEC regulations nor DHEC's NPDES En-

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[1] Laidlaw also sought dismissal based on FOE's lack of standing to bring suit, which the district court denied. Tr. of Hr'g on Def.'s Mot. for Summ. J., June 30, 1993, at 40. Laidlaw later moved to dismiss plaintiffs CLEAN and Sierra Club because they did not join FOE's Section 505 notice letter or send a letter on their own behalf—a jurisdictional defect which precludes their pursuit of a citizen suit. 33 U.S.C. § 1365(b). The district court denied that motion. JA 57.

[2] The district court rejected Petitioners' unfounded assertion that DHEC's June 1992 consent decree with Laidlaw was the result of fraud or collusion. JA 117 n.14.

forcement Agreement with the EPA contains such a requirement. JA 127-29. The district court, therefore, retained jurisdiction and allowed the case to proceed to the merits.

The District Court's Decision On The Merits

After another evidentiary hearing, the district court issued its merits findings on January 21, 1997. The court found that DHEC played an extensive role in the process that ultimately solved the discharge problems: "DHEC was made aware on a continuous basis of the compliance problems Laidlaw was experiencing. An open line of communication between Laidlaw and DHEC existed throughout the time period relevant to this litigation." JA 162. Furthermore:

> DHEC's knowledge of these problems, its enforcement efforts with respect thereto, and the agency's continued involvement with Laidlaw in achieving a solution to these problems have resulted in Laidlaw's ultimate compliance with its NPDES permit over an extended period of time.

JA 162-63. The district court also found that the permit exceedances had caused "no demonstrated adverse affect on the environment." JA 164.

The district court denied Petitioners' prayer for equitable relief, finding that the "lack of demonstrated harm and the fact that Laidlaw is now and has for an extended period of time been in compliance with its permit compels the conclusion that no injunction or other form of equitable relief is appropriate." JA 183. The court specifically found that Laidlaw already had been in full compliance for non-mercury metals discharges since 1991, and in "substantial compliance" with respect to mercury discharges since "at least" August 1992. JA 89, 183.

The district court nonetheless assessed additional civil penalties beyond those imposed by the State.[3] JA 160-82. After acknowledging a number of mitigating factors—including Laidlaw's good faith efforts to comply with a "draconian" mercury level requirement, the expenditure of over $1,000,000 on consultants and technology, its coordination with the State's environmental agency, and the absence of harm to the environment (JA 146, 162, 173-74)—the court imposed a sanction for each mercury permit violation since January 1987, for a total of $405,800. JA 172, 185-95. Based on the per discharge penalty established by the district court (JA 181), the fourteen post-complaint exceedances constituted $15,000 of the total penalty. JA 195. The ten reporting and thirteen post-complaint monitoring violations constituted an additional $2,300 of the total penalty. JA 159, 181. The district court also stayed the time for a petition for attorneys' fees until after resolution of any appeals.

The Court of Appeals' Decision

Petitioners appealed from the district court's civil penalty judgment, "arguing that the district court abused its discretion by imposing what Plaintiffs assert was an inadequate penalty." 149 F.3d 303, 305. Laidlaw cross appealed, arguing that Petitioners lacked standing and that the case should have been barred in light of DHEC's diligent efforts to seek compliance prior to Petitioners'

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[3] The penalty assessment required the district court to detail the history of Laidlaw's mercury exceedances and reporting violations, most of which pre-dated the filing of the federal case. Of 489 total exceedances, only 11 occurred between June 12 and October 1992 and one each in 1993, 1994 and 1995. JA 158, 178. The last two occurred when Laidlaw was not even feeding mercury into its incinerator. Moreover, the last two also did not exceed the new 10 ppb permit limit established by the State, which would have been in effect but for the state administrative appeal that Petitioners had taken challenging the new limit. JA 148-49, 178. Only 10 minor technical reporting requirements violations and 13 monitoring violations occurred after the filing of Petitioners' complaint. JA 159.

complaint. *Id.* The Fourth Circuit concluded that the case was moot "[b]ecause plaintiffs ha[d] not appealed the denial of declaratory and injunctive relief," and under *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 118 S. Ct. 1003 (1998), civil penalties payable solely to the United States Treasury do not "redress any injury suffered by a citizen plaintiff." *Id.* at 306. Because Petitioners could not obtain relief on the merits, the Fourth Circuit also held that they could not recover attorneys' fees. *Id.* at 307 n.5.

SUMMARY OF ARGUMENT

Because Petitioners' appeal addressed only the civil penalty judgment in which they themselves had no personal stake, their appeal could not proceed. They have no personal stake in an award of civil penalties that is not payable to them, but to the United States Treasury. *Steel Co. v. Citizens for a Better Environment*, 118 S. Ct. 1003, 1018 (1998). The possible deterrent effect of a judgment for civil penalties does not provide a private party, which can lay no claim to any part of those penalties, with a sufficient personal stake in the outcome of a case to sustain a federal court's jurisdiction. In the absence of parties on both sides of the question having a personal stake in the outcome of the appeal, it would have been improper for the court of appeals to resolve the difficult substantive issues concerning the proper standards to be used by the State or the district court in imposing a civil penalty.

Assuming that it is necessary for this Court to reach the issue, it is also clear that the district court could not award civil penalties in the first instance. Once the district court properly denied Petitioners' request for any equitable relief, it should not have imposed civil penalties. It is doubtful that a federal court ever has jurisdiction to entertain the claim of a private party that seeks the payment of

money not to itself but to the public treasury. At a minimum, however, the only way to assure that the court has some basis for jurisdiction at all stages of a citizen suit is for civil penalties to be awarded only as an adjunct to a proper and necessary injunction.

In this case, however, no judgment was proper because Petitioners lacked standing from the outset. As the court found, there was no harm to the environment. Moreover, at the time of suit, Laidlaw had committed in a consent decree to use every effort to avoid future violations—an agreement that caused Laidlaw temporarily to shut down its facility, and under which Laidlaw acted to eliminate the last, nagging technical difficulty that would allow the facility to operate in complete compliance. This case, therefore, did not present the type of ongoing injury or ongoing violation on which a citizen suit can proceed. Finally, in light of the jurisdictional prohibition barring a citizen suit when the State is already diligently seeking compliance, jurisdiction was lacking here. Where the State actively has pursued *compliance*, a jurisdictional finding of lack of diligence cannot be based, as it was here, on dissatisfaction with the magnitude of the civil penalties previously imposed by the State.

Assuming it is proper to reach the question here, attorneys' fees could not properly be awarded in this case because Petitioners did not obtain a judgment or settlement that provides any relief to them. Moreover, the district court found that Laidlaw's compliance was prompted by the State agency, not the citizen suit.

ARGUMENT

I. THE COURT OF APPEALS PROPERLY DISMISSED THE APPEAL OF A PARTY THAT HAD NO PERSONAL STAKE IN THE OUTCOME OF THE CASE

A. The Court Of Appeals Did Not Have Jurisdiction Over An Appeal In Which Appellants Only Were Pursuing Relief In Which They Had No Personal Stake

Petitioners presented an appeal to the Fourth Circuit starkly inconsistent with Article III's case-or-controversy requirement. On appeal, Petitioners abandoned their earlier claim for an injunction—a remedy in which they would, in theory, have a personal stake because it would bar the defendant from engaging in conduct that would cause Petitioners harm. Instead, Petitioners' appeal was concerned solely with the amount of the civil penalty that the district court ordered payable to the United States and to which Petitioners could lay no claim. A citizen-plaintiff has *no* cognizable legal interest in, and thus *no* standing to prosecute, an action seeking the exaction of a civil penalty payable solely to the public treasury. *See Steel Co.*, 118 S. Ct. 1003.[4]

"Standing" is a fundamental part of the "case-or-controversy" requirement that circumscribes the jurisdiction of Article III courts. Standing has been divided into three elements: a plaintiff must have suffered, or in an equity action be threatened by, some concrete injury; the injury must be caused by defendant's conduct; the injury must be redressable by the court. *See Steel Co.*, 118 S. Ct. at

[4] *Steel Co.* was decided during the pendency of the appeal, and plainly applies to citizen suits brought under the Clean Water Act. A civil penalty payable to the United States Treasury can no more provide a personal benefit to the citizen-plaintiff under the Clean Water Act than it could under the Emergency Planning and Community Right-To-Know Act of 1986 ("EPCRA"), 42 U.S.C. §§ 11001 *et seq.*, at issue in *Steel Co.*

1016-17. The basic requirement that a lawsuit in the federal courts can proceed only when it offers the plaintiff an opportunity to obtain concrete relief reflects the traditional, limited role of the federal courts within our constitutional structure.

Where a case involves past injury, the issue of redressability ordinarily presents little difficulty. If monetary relief is available in the form of damages, the award of such relief to the plaintiff will redress the injury by providing plaintiff with compensation. When the case involves only the threat of future harm, the issue of redress turns on the availability of some form of equitable relief that would bar the defendant from engaging in wrongful conduct that otherwise would harm the plaintiff.

Civil penalties that are not payable to the citizen-plaintiff do not redress its injuries or provide it with a personal stake in the outcome of the case sufficient to ground a federal court's jurisdiction.[5] A citizen-plaintiff does not have a personal stake in a monetary judgment requiring payment to another party—particularly where the payee is the public treasury. Such a payment is not compensation for the plaintiff's past injury, and is not compensation to the plaintiff if paid to someone else. Nor can such a payment be equated with an injunctive decree that bars the defendant from engaging in conduct that will harm the plaintiff.

That the plaintiff has suffered or is threatened with injury at the hands of the defendant may therefore be presumed for purposes of analysis here, as it was in *Steel Co.*, 118 S. Ct. at 1018. It also may be assumed that the

[5] Petitioners lay no claim to any part of those penalties. This was not the "unusual case in which Congress has created a concrete private interest in the outcome of a suit against a private party for the Government's benefit by providing a cash bounty for the victorious plaintiff." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 (1992).

plaintiff will derive satisfaction from the fact that someone who has caused injury is directed to pay a penalty. *Id.* at 1018-19. But neither the fact of injury nor the hope of such psychic satisfaction provides a "personal stake" in civil penalties sufficient to satisfy Article III. The satisfaction derived from directing money to the Treasury, or punishing a wrongdoer, "is not an acceptable Article III remedy because it does not redress a cognizable Article III injury." *Id.* at 1019. With a request for civil penalties, a private plaintiff actually "seeks not remediation of its own injury . . . but vindication of the rule of law—the 'undifferentiated public interest' in faithful execution of [the law]." *Id.* at 1018 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 557 (1992)). Within the federal system, only governments have a cognizable general interest in enforcing the law sufficient to sustain federal court jurisdiction.[6]

Through the exercise of equity power, a federal court may provide relief that benefits many more people than just the individual plaintiff. But the relief must always *at least* directly benefit the plaintiff. A personal stake in the outcome is what assures the concrete adverseness upon which the courts depend.[7] It also confines the federal

[6] A sovereign has a cognizable interest in enforcing the law and imposing punishment; a private party does not. *See Maine v. Taylor*, 477 U.S. 131, 137 (1986). The Executive Branch is designated to enforce the law on behalf of the United States. Serious Appointments Clause and Separation of Powers issues are raised by the Legislative Branch's effort to empower private parties to invoke the jurisdiction of the federal courts in pursuit of civil penalties payable solely to the United States. If private parties are allowed to stand in for Executive Branch officials, those private parties must *at least* have a personal interest in the outcome (*i.e.*, financial recovery, on the one hand, or equitable relief on the other) that is the hallmark of a private suit.

[7] *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804 (1985) (stating that Article III standing requires " 'such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues' ") (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982) ("The requirement of 'actual injury redressable by the court' . . . tends to assure that the legal questions will be resolved . . . in a concrete factual context conducive to a realistic appreciation of the consequenecs of judicial action.") (internal citation omitted).

courts to their traditional role consistent with separation of powers principles. The personal stake in the outcome provides the only basis upon which a federal court may wield judicial power. It must, therefore, exist at all stages of the case.[8] Article III is no less important at the stage at which judicial power is most forcefully exercised (the remedy stage), than when the case is first presented.

The requirements of Article III are as important on appeal as at the inception of a case. If there is no party with a personal stake in the outcome to pursue the appeal, the appeal must be dismissed.[9] It has long been the rule that

> when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever,

[8] *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980) ("The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)."); *Spencer v. Kemna*, 523 U.S. 1, 118 S. Ct. 978, 983 (1998) ("throughout the litigation, the plaintiff 'must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision' ") (quoting *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990)).

[9] *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997) ("To qualify as a case fit for federal-court adjudication, 'an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.' "); *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 549 (1986).

> the court will not proceed to a formal judgment, but will dismiss the appeal.

Mills v. Green, 159 U.S. 651, 653 (1895). The same rule necessarily applies where, as here, the plaintiff abandons on appeal its only claim for "effectual relief." *Cf. Ashcroft v. Mattis*, 431 U.S. 171 (1977) (per curiam).

This case illustrates the danger of allowing a party to prosecute an appeal in which it has no direct stake in the outcome. The heart of Petitioners' appeal concerned the important issues related to the proper measure for a state agency or a federal court to employ in assessing a civil penalty for violation of the Clean Water Act. Yet the State of South Carolina, whose penalty assessment policies and enforcement practices were assailed, was not party to the trial or the appeal. *Cf. Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49, 61 (1987) (noting the potential that citizen suits will undermine state enforcement efforts). Moreover, the United States—the only entity with a direct interest in the assessment of the civil penalties awarded by the district court—also was *not* a party to the appeal, or at any other stage of the case.

In the absence of parties on both sides possessing a personal stake in the outcome, the court of appeals properly dismissed the appeal and vacated the judgment.

B. Because Petitioners Abandoned The Request For Relief In Which They Had A Personal Stake, The Court of Appeals Was Not Required To Determine Whether Laidlaw's Compliance Independently Rendered The Case Moot

Petitioners and Amicus United States argue that the appeal could not be dismissed as moot unless Laidlaw showed that its permit discharge problems "could not reasonably be expected to recur," obviating any threat of future harm. Pet. Br. 23; Br. for the United States as Amicus Curiae ("Gov't Br.") 26. They argue that it was

necessary for the district court or the court of appeals to first render a specific finding to that effect before dismissing the case as moot.

But a specific finding that "voluntary cessation" of conduct has eliminated the threat of future harm is not the only basis to find a case moot. As noted above, a plaintiff's own actions can moot a case, and that is precisely what happened here. On appeal plaintiffs abandoned their request for an injunction or other equitable remedies, thereby giving up every claim for relief that could provide them with personal benefits. Consequently, the case could not proceed—and there was no need for the court of appeals to determine whether Laidlaw met the "heavy burden" [10] of showing that there was no threat of future harm.

In denying the injunction, the district court concluded that Laidlaw "is now and has for an extended period of time been in compliance." JA 183. It did not believe that Laidlaw was required to "show that there is no chance of a future permit violation."[11] JA 183. Such a strong showing may be appropriate where the defendant seeks to put a premature halt to proceedings by having the case declared moot. But denial of injunctive relief on the merits did not ultimately require that degree of certainty. In light of the fact that there had been no harm to the environment, and

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[10] The "heavy burden" of showing mootness has been applied only in cases where mootness is raised by a defendant's self-serving assertion that *it* has ceased the offending conduct. No similar heavy burden has been imposed where mootness is the product of plaintiff's own actions or litigation decisions.

[11] Although the district court did not make a finding that there was absolutely no possibility of future harm, it is obvious from the record that it perceived no such threat, and denied an injunction on that basis. Moreover, in light of the fact that the facility has been closed, there can be no serious argument about a threat of future harm sufficient to ground federal court jurisdiction in pursuit of an injunction. *See* Respondent's Suggestion of Mootness, filed June 9, 1999.

that Laidlaw had worked cooperatively with DHEC to comply with an unnecessarily stringent standard, the many years of compliance were sufficient to demonstrate that no equitable remedy was required to protect Petitioners from future harm. Petitioners did not challenge these findings. Having been denied the *only* form of relief in which they had an interest—a form of relief that is designed specifically to prevent future harm—and not challenging that denial on appeal, there was no basis to continue the case.

Ignoring this principle, Amicus United States argues that the "court of appeals erred in ruling that a Clean Water Act citizen suit . . . must be dismissed as moot if the district court concludes that injunctive relief is unwarranted." Gov't Br. 8. Petitioners and the United States insist that the question the Court should address is whether a citizen suit becomes moot after the citizen's request for injunctive relief is *denied*.

As shown above, that is not the question presented. Indeed, the answer to that question as posed is plainly "no," although *not* for the reasons suggested by Petitioners and the United States. Denial of an injunction is a disposition on the *merits*, not a disposition of the case as moot. If, after injunctive relief was denied, Petitioners appealed that decision, the appellate court would have jurisdiction to consider Petitioners' challenge to that denial. But where, as here, Petitioners are no longer even *seeking* relief for themselves, that fact is dispositive.

This does not mean that it would be proper for the district court to impose civil penalties after denying an injunction, even if the plaintiff had not abandoned its claim for injunction. To the contrary, as shown below, a federal court's authority to impose civil penalties in a suit by a private party is doubtful under any circumstances. The notion that a party can obtain relief for someone other than itself is inconsistent with Article III's case-or-controversy requirement. *See* Part IIB, *infra*.

In Laidlaw's view, however, Petitioners' decision to abandon the injunction claim on appeal is dispositive and obviates the need to answer the questions posed by Petitioners and the United States regarding the precise circumstances under which a district court lacks a jurisdictional basis to exact penalties in a CWA citizen suit.

C. Petitioners Did Not Obtain A Declaratory Judgment Or Any Other Equitable Relief Sufficient To Preserve Appellate Jurisdiction

Petitioners argue that their failure to pursue an injunction on appeal is not fatal because they obtained a different form of equitable relief from the district court, a "declaratory judgment as to liability." Pet. Br. 40, 42. Petitioners' assertion is without basis in the record and without support in the law.

No "declaratory judgment as to liability" was ever issued pursuant to 28 U.S.C. §§ 2201, 2202. Petitioners sought "both a declaratory judgment and injunctive relief" (JA 182), but the district court declined to grant *either*, explaining "the fact that Laidlaw is now and has for an extended period of time been in compliance with its permit compels the conclusion that *no injunction or other form of equitable relief is appropriate. Accordingly, plaintiffs' request for equitable relief is denied*." JA 183 (emphasis added).

What Petitioners call a "declaration of liability" is the district court's finding of liability in imposing a civil penalty. This Court has held, however, that the incidental pronouncement of a court on a matter of law or fact is *not* equivalent to a declaratory judgment. To "suggest such an equivalency is to lose sight of the nature of the judicial process." *Hewitt v. Helms*, 482 U.S. 755, 761 (1987); *see also id.* at 762 ("[T]here is a very practical objection to equating statements of law (even legal holdings en route to final judgment for the defendant) with declaratory judgments.").

Moreover, there is a fundamental difference between a "declaration of [past] liability" and the type of declaratory judgment, prospective in nature, that actually will forestall a threatened injury and thus provide some benefit to the plaintiff. For example, a declaration that a law is unconstitutional or a regulation invalid is presumed to provide redress as effective as an injunction because of its prospective effect. The government is expected to refrain from enforcing a law that a court has declared unlawful. Similarly, private parties who seek a declaration about the meaning of a contract or title to property may have standing to seek that declaration because it will control their future behavior. The effect of a judicially enforceable declaratory judgment on the parties' ongoing relationship provides concrete relief to the plaintiff by materially altering the legal relationship of the parties. *Id.* at 761.

In contrast, a "judicial statement that does not affect the relationship between the plaintiff and the defendant is *not* . . . equivalent [to a declaratory judgment]." *Id.* (emphasis in original). A "declaration of liability," without more, is inherently retrospective. Likewise, an award of civil penalties for past wrongs will not preclude future wrongs. Petitioners fail to grasp the distinction between a civil penalty ruling concerning only past liability, which benefits them not at all, and the grant of some form of equitable relief that will protect them from future harm, which the district court found unnecessary.

D. The Deterrent Effect Of A Civil Penalty Does Not Provide A Private Plaintiff With Standing To Continue Pursuing Such Penalties

Amicus United States argues that upon an initial showing of a continuing violation, unless and until the court makes a finding that there is no longer any threat of future injury, a private plaintiff should independently have standing to pursue civil penalties to deter possible future violations. Gov't Br. 24. Under this theory, the possible deterrent effect of the penalty independently provides the plaintiff with the required personal stake in the outcome to continue a case, whether or not plaintiff even seeks an injunction to stop a violation.

This theory is advanced by Petitioners and the United States without support from this Court's cases, or any historical analogue involving the jurisdiction of the federal courts.[12] Indeed, it appears contrary to conventional understandings concerning the differing roles of civil penalties and equitable remedies. Injunctions and declaratory orders are designed to provide prospective relief by prohibiting (or requiring) action to prevent future harm. In contrast, civil penalties are retrospective in design. They punish past behavior.[13] Private plaintiffs have heretofore had no legally recognized interest in the exaction of penalties for the benefit of the public. "[I]n American jurisprudence at least, a private citizen lacks a judicially cog-

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12 Under that theory, citizens would have standing to compel the government to prosecute law violators on the grounds that such prosecutions will deter future violations. But, in contrast with those state courts which allow citizens to prosecute criminal cases in some circumstances, the federal courts have never been offered as a forum for private party criminal prosecutions. The restrictions of Article III itself, and the clear constitutional assignment of responsibility for enforcing the law to the Executive Branch, preclude such private enforcement actions. The Legislative Branch cannot permissibly encroach on the power of the Executive Branch by assigning Article II power to private parties, at least absent some traditional private-party controversy that independently grounds the jurisdiction of the federal court.

13 The Clean Water Act reflects Congress' view that civil penalties are retrospective in focus—meant to punish for past violations. While the imposition of penalties may, of course, deter noncompliance, this Court has recognized the essential punitive nature of civil penalties under the Act. *Tull v. United States*, 481 U.S. 412, 422 (1987) (penalties authorized under § 1319(d) are "of th[e] character" of "[r]emedies intended to punish culpable individuals").

nizable interest in the prosecution or nonprosecution of another." *Linda R. S. v. Richard D.*, 410 U.S. 614, 619 (1973); *see also Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 897 (1984).

Petitioners stretch for precedential support for their theory from the statement in *Gwaltney* that "citizens . . . may seek civil penalties only in a suit brought to enjoin or otherwise abate an ongoing violation." 484 U.S. at 59. Petitioners read this sentence as holding that penalties "abate" violations. *See* Pet. Br. 17. But the Court's opinion did not go that far. The Court simply postulated, consistent with the statute, that civil penalties may be proper as an adjunct to a case brought to enjoin or abate violations. The Court did not say or imply that civil penalties themselves abate an ongoing violation, let alone that such a theory would comport with the requirements of Article III.

Petitioners' reliance on deterrence as providing the basis for Article III standing for private parties to seek the imposition of civil penalties fundamentally misapprehends the mechanism through which "deterrence" works. The heart of the deterrence rationale is the *threat* that penalties will be imposed in the future, not the actual exaction of penalties for what has taken place in the past. Thus, Petitioners might plausibly have an interest in the issuance of a court order that declared any future violations of the CWA by Laidlaw would result in the mandatory imposition of a $25,000 penalty. Such an order would be addressed directly to future behavior, creating a deterrent to future wrongdoing.[14] In contrast, an order actually imposing a penalty for prior wrongdoing is addressed primarily to the past.

[14] Consent order provisions setting penalties for future violations are a common way for government enforcement agencies to pursue enhanced deterrence against such violations.

This is not to belittle the utility of deterrence. The availability of civil penalties under a statute adds to the statute's deterrent force. Moreover, seeing the law actually enforced against someone has some additional, general deterrent force. That general deterrence does not, however, provide the plaintiff with specific relief to redress his own injury in any particularized sense. *See Steel Co.*, 118 S. Ct. at 1018-19 (interest in deterrence does not satisfy Article III).

The United States and Petitioners focus on the marginal additional deterrent force on a particular company associated with imposing civil penalties on that company. Of course, in the context of this case, they are talking about the marginal chastening force of imposing *additional* civil penalties on a party that not only had been making every effort to comply with the law, but already had been subjected to civil penalties by the State, which has the primary responsibility for balancing penalties against other interests in prompting compliance.[15]

The theory "that the punishment will deter the risk of future harm" was the subject of a concurring opinion in *Steel Co.*, but was found by the Court to reach too far. "Obviously, such a principle would make the redressability requirement vanish." *Steel Co.*, 118 S. Ct. at 1018. There is a fundamental difference between a judicial decree that *directs* future compliance with a statute, regulation or judicial rule, thus by its terms barring actions which may cause harm to the plaintiff, and the exaction of penalties for past harm, which may deter future misconduct but does not prohibit it. The former provides direct redress of the plaintiff's injury; the latter does not.

[15] Of course, the threat of civil penalties is always present under the CWA, whether or not citizens can pursue them. The State and the EPA can, and do, pursue civil penalties in cases across the country.

Thus, a plaintiff has standing to seek an injunction that would prohibit some conduct by the defendant that harms the plaintiff. The injunction is deemed to be a proper subject of a private suit because the rule of law rests on the assumption that laws and court orders will be obeyed, and therefore control a party's conduct. But the cases have not suggested that individuals have standing to pursue civil penalties for past wrongs on the theory that such punishment *may* affect a defendant's future behavior.

Whether the meting out of penalties for past wrongs will have a deterrent effect in any particular situation is uncertain—depending on a multitude of factors, such as the financial status of the company and the personality of its managers. It is impossible to say that any given award of civil penalties will prevent any specific future violations of the law. It must be " 'likely,' as opposed to merely 'speculative,' that the injury" of which plaintiff complains "will be 'redressed by a favorable decision.' " *Lujan*, 504 U.S. at 561 (quoting *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 43 (1976)).

As advanced in this case, the deterrence argument is, at most, tenuous. The findings of the district court made clear, based on at least five years of Laidlaw's continuous compliance, that the threat of future harm was almost nonexistent. Thus, the deterrence suggested by the United States was directed to a nonexistent (or barely existent) threat. Moreover, it is difficult to see the incremental deterrent impact on a company that had been actively pursuing compliance, had made (notwithstanding potential objections to the standards) costly efforts at compliance, and was already obligated in an agreement with the State to put an end to mercury violations. Moreover, the State had, in the exercise of its discretion, already exacted penalties for those same violations. The district court found here that it was *mandated* under the Act to impose civil penalties for past violations. JA 160. This undermines

the notion that civil penalties were imposed here in order to deter Laidlaw from future violations. If the threat of future harm were real, the court's first recourse would necessarily be to a traditional means of barring future harm by injunction, not to the speculative influence of penalties for past violations.

Petitioners and Amicus United States place heavy reliance on the statement in *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 314 (1982), that "an injunction is not the only means of ensuring compliance." The Court stated there that "the *FWCPA itself*, for example provides for fines and criminal penalties." *Id.* (emphasis added). In so doing, the Court was addressing the contention that an injunction must issue in connection with every violation of the Act or else the regulated community would be free to ignore the requirements of the Act with impunity. The Court simply pointed out that the statute *of its own force* deters violations by establishing fines and criminal penalties for noncompliance.[16]

The deterrence argument of the United States turns the traditional role of civil penalties upside down. In a government action, the availability of penalties for past violations would ordinarily *obviate* the necessity of examining continuing injury in a mootness inquiry; the availability of the retrospective remedy would keep the case alive. Here the United States suggests the opposite result—that such civil penalties can *only* be imposed if there is a threat of future harm. In fact, the district court's jurisdiction to exact civil penalties is, under this theory, specifically connected to the deterrent effect of the penalties on the particular party—and presumably the amount of the pen-

[16] Courts, however, compel compliance in particular cases by issuing orders that require obedience. They do not do so by imposing penalties for past violations. Indeed, the Court explained in *Romero-Barcelo* that the district court in that case had acted to assure compliance not, as Petitioners would have it, by imposing penalties, but by "ordering the Navy to apply for a permit." 456 U.S. at 315.

alty must be specifically calibrated only to deter, for the court may not use the penalty to exact retribution.

Petitioners' arguments highlight the overbreadth of their deterrence rationale as a basis for standing. Laidlaw filed a Rule 21 Suggestion of Mootness in this Court based on the fact that it ceased all operations at the facility that was the subject of this lawsuit. Although that cessation precludes the possibility of any further harm at the only facility owned and operated by Respondent, Petitioners argue that imposing civil penalties on Respondent will deter future violations at "16 other NPDES permitted facilities," owned and operated by corporate affiliates of Respondent near where some of Petitioners' members live. *See* Pet. Resp. to Suggestion of Mootness 8. Under that theory, anyone who lives within shouting distance of any facility owned and operated by a corporate affiliate of Respondent anywhere in North America would have standing to maintain a suit for civil penalties in connection with *this* facility because the deterrent effect of the award of civil penalties here might be said to deter Laidlaw from violating the law elsewhere.

E. Irrespective Of Whether Violations Are Continuing, A Case Cannot Continue When The Court Cannot Provide Plaintiff Any Effectual Relief

Petitioners and Amicus United States also argue that the existence of a continuing violation has independent jurisdictional significance. Under this theory, a continuing violation at the outset of a case provides the court with jurisdiction; once the court has jurisdiction, it can issue any remedy it desires so long as it chooses to retain that jurisdiction. In support of this theory, Petitioners note the "heavy burden" on a defendant that seeks to have a case dismissed as moot based on its contention that it has stopped violating the law. But in emphasizing this point, Petitioners reveal a fundamental confusion about the reasons *why* the existence of a continuing violation is important.[12] A continuing violation is indicative of a realistic threat of future injury, which is, in turn, the predicate for a court to grant an injunction. It is the answer to the question whether some effectual remedy continues to be available to plaintiffs, not simply whether harm is continuing, that determines whether an Article III case or controversy still exists.

In connection with a Clean Water Act citizen suit, an ongoing violation is important for two related reasons. First, the ongoing violation fulfills the *statutory* requirement that a citizen-plaintiff must allege "a state of either continuous or intermittent violation—that is, a reasonable likelihood that a past polluter will continue to pollute in the future." *Gwaltney*, 484 U.S. at 57. This sounds exactly like the precondition for an injunction; Congress clearly made it a precondition to suit.

Second, the issue of an ongoing violation is frequently addressed in connection with "mootness." The focus there is whether defendant's "voluntary cessation" obviates the threat of future harm and thus divests the court of its authority to grant any relief. The threat of future harm is important because it is the precondition for granting equitable relief to the plaintiff. *Cf. Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983) (referring to the "equitable doctrine that cessation of the challenged conduct does not bar an injunction"). The ability to potentially grant *some* relief to the plaintiff is the predicate for the court's continued exercise of its jurisdiction. The significance of the continuing violation for purposes of the mootness inquiry is

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[17] The traditional resistance to a defendant's self-interested assertion that it has voluntarily stopped engaging in wrongful conduct is *not* due to some unstated rule that having overcome its initial reluctance to take the case, a court becomes even more reluctant to give it up. The resistance simply reflects skepticism about a defendant's self-interested assertion that it has suddenly mended its ways. *See Steel Co.*, 118 S. Ct. at 1020; *Gwaltney*, 484 U.S. at 67.

thus tied to whether the court continues to be in a position to provide redress for the plaintiff's injury.[18] *See generally Steel Co.*, 118 S. Ct. at 1020.

The ultimate question, therefore, is whether the court will be able to provide "effectual relief." *Mills*, 159 U.S. at 653. This reflects the broader link between "mootness" and redressability.[19] If the court cannot provide the plaintiff any effectual relief, the case cannot continue and must be dismissed, regardless of whether there is a "continuing violation."

F. No Distinction Between "Standing" And "Mootness" Allows Petitioners To Continue Pursuing This Case

Petitioners argue that *Steel Co.* was a standing decision, while this case involves only mootness. They suggest, in essence, that standing is a rigid doctrine designed to keep interlopers out of court, but once they have passed the portals, "mootness" is flexibly applied to allow them to stay. Pet. Br. 23-24. Petitioners thus assert that having successfully invoked the district court's jurisdiction by alleging and proving a continuing violation at the beginning of the case, they may continue the case on appeal in pursuit of additional civil penalties even if the violations have ceased.[20]

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[18] Obviously, if the plaintiff may recover damages, the court's jurisdiction is unaffected by whether the violation is continuing. Conversely, if in an equity action the court suddenly was stripped of all power to grant an equitable remedy, the case would be dismissed on the merits. Plaintiff could not maintain the case, or the court its jurisdiction, with no relief available.

[19] *See, e.g., Spencer v. Kemna*, 118 S. Ct. at 988 (mootness arises when there is "nothing . . . to remedy"). *Cf. Calderon v. Moore*, 518 U.S. 149, 150 (1996) (availability of possible remedy keeps a case from being moot).

[20] This case illustrates the likely consequences of such an approach. Based on its commitments to the State that preceded this

The distinction Petitioners (and, to a lesser extent, Amicus United States) posit between standing and mootness is not to be found in the Constitution. Both doctrines derive from the application of the same case-or-controversy requirement.[21] The ultimate question on mootness, as it is on initial standing, is whether there continues to be a controversy before the court in which the parties have a personal stake and for which the court can provide redress.[22] Petitioners' theory that having alleged jurisdiction at the outset, a plaintiff may then go on to pursue civil penalties irrespective of some independent basis of standing to do so is, of course, inconsistent with

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lawsuit, Laidlaw came into compliance with the non-mercury exceedance limits by March 1991 and into substantial compliance with mercury limits no later than August 1992, shortly after the suit began. JA 183. The district court nonetheless proceeded to examine hundreds of pre-complaint violations. JA 158-59, 178. Although the focus of the citizen suit is primarily to afford affected citizens a means of protecting themselves from harm when the government cannot, or will not, command compliance (*see Gwaltney*, 484 U.S. at 62), by the time the district court turned to the substantive issues in its 1995 and 1997 opinions, the straightforward matter of bringing Laidlaw into compliance was long since resolved. Instead, the trial court focused on the difficult issues associated with meting out appropriate penalties for violations that took place long ago and had been redressed by Laidlaw's and the State of South Carolina's efforts to find a workable method of limiting Laidlaw's mercury discharges.

[21] Indeed it has been said that moootness is simply "the doctrine of standing set in a time frame." *Arizonans*, 520 U.S. at 68 n.22 (quoting *Geraghty*, 445 U.S. at 397).

[22] The redressability principle is at the core of Article III. It informs conceptions of both standing and mootness. Even if one regards mootness as a prudential doctrine allowing the courts to consider moot cases "where there are strong reasons to override" the doctrine, *Honig v. Doe*, 484 U.S. 305, 331 (1988) (Rehnquist, C.J., concurring), the fact remains that those "strong reasons" are rarely found. The federal courts' institutional interests that require the mootness doctrine to be "overridden" in rare cases have never been found to exist in a whole class of cases, *e.g.*, CWA citizen suits, such as those at issue here.

the settled understanding that a proper case or controversy must exist at all stages of a suit.

Petitioners' reliance on *Gwaltney* is especially suspect. *Gwaltney* addressed whether citizen-plaintiffs could nonetheless "press their suit to conclusion" where "allegations of ongoing noncompliance [sufficient to invoke the court's jurisdiction] become false at some later point in the litigation *because the defendant begins to comply with the Act.*" 484 U.S. at 66 (emphasis added). This Court found they could not. Once "defendant begins to comply with the Act"—at least in the sense of obviating any likelihood of future harm—the case is moot and the action must be dismissed. The Court emphasized the "heavy burden" on the defendant in seeking to obtain dismissal by virtue of voluntary cessation of its alleged wrongful conduct. But the Court expressed no doubt that if violations convincingly ceased—obviating the threat of future harm—the action could not proceed simply to obtain penalties for past violations. *Id.* at 66-67. Indeed, the Court explained that "plaintiffs are also protected from the suddenly repentant defendant by the authority of the district courts to award litigation costs 'whenever the court determines such award is appropriate.'" *Id.* at 67 n.6. The Court's discussion of these "protections" from the "repentant defendant" would have been wholly unnecessary if, as Petitioners suggest, a plaintiff may continue to prosecute a claim for civil penalties even after the defendant has ceased violating the Act.

Petitioners also argue that a close view of *Gwaltney* would show that violations in that case ceased before the action was filed, that the district court denied an injunction, and that the denial of the injunction was not appealed, yet the Court did not dismiss the case as moot. Pet. Br. 15. Petitioners reason that since the Court "implicitly, but clearly, held that the case was not moot, it

necessarily concluded in *Gwaltney* that injunctive relief is not essential for Article III jurisdiction in a citizen suit where ongoing violations are alleged and proved." Pet. Br. 17. In *Steel Co.*, the Court commented on another effort to read jurisdictional rulings into *Gwaltney*, cautioning against reliance on "drive-by" jurisdictional holdings of the kind that Petitioners construct. 118 S. Ct. at 1011.

Even on its own terms, however, Petitioners' effort to derive a constitutional holding out of *Gwaltney's* failure to find the case moot is ill-conceived. The Court vacated the civil penalties awarded in the lower court, focusing on the possible absence of *statutory* jurisdiction. Where the Court identifies a lack of jurisdiction on one ground, this cannot be taken to mean that the Court held that the plaintiff surmounted every other jurisdictional hurdle not addressed in the Court's opinion.

II. THE DISTRICT COURT LACKED AUTHORITY UNDER ARTICLE III TO AWARD CIVIL PENALTIES TO PETITIONERS

A. A Private Party May Not Pursue Civil Penalties Payable Solely To The Public Treasury

Under this Court's decisions, it is doubtful that a private party can ever be awarded a judgment requiring payment of a civil penalty solely to the United States Treasury. This limitation on the remedies a private party may obtain exists whether or not the federal court has *jurisdiction* over some other claim presented by that private party.

Article III is not simply a statement of jurisdiction. Rather, it is a description of the federal judicial power. It is inconsistent with the proper, historic limitations on judicial power to allow it to be exercised—*i.e.*, to dispense punishment—on behalf of someone who has no legally cognizable interest in the remedy.

The federal court's remedial power may only be exercised on behalf of a party who has standing to seek the remedy in question. Thus, in *Lyons,* this Court held that there was no jurisdiction over a party's request for a broad injunction that, while possibly benefiting others, was unlikely to prevent any future harm to the plaintiff himself. 461 U.S. 95. The fact that the plaintiff was previously the victim of such harm did not provide standing to pursue equitable relief.

This Court addressed a similar issue in *Lewis v. Casey,* 518 U.S. 343 (1996). The Court found jurisdiction over certain claims of the prisoner plaintiffs. But this did not provide the district court with the authority to grant equitable relief throughout the prison system or to remedy harms quite unlike those suffered by the prisoner-plaintiffs. As the Court pointed out, "standing is not dispensed in gross. If the right to complain of *one* administrative deficiency automatically conferred the right to complain of *all* administrative deficiencies, any citizen aggrieved in one respect could bring the whole structure of state administration before the courts for review." 518 U.S. at 358-59 n.6. Whether or not a federal court has jurisdiction over some claim (as in *Lyons,* for an award of damages), plaintiffs may only obtain *relief* that benefits themselves.

This Court's historic concern that issues can properly be presented only by a party with a direct stake in the resolution of those issues is just as important in the context of a specific claim for relief as it is in connection with the initial filing of a suit. Indeed, the danger of allowing a party to seek relief that does not benefit that party is well illustrated by this case. Petitioners are not suitable advocates to advance the claim of the United States or South Carolina for the imposition of civil penalties. As this Court noted in *Gwaltney,* allowing a private

party to assert claims for civil penalties can interfere with the remedial objectives of those charged with primary responsibility for enforcement of the Act: state and federal officials. These representatives clearly do have a cognizable interest in the award and amount of civil penalties. They may, as they choose, compromise civil penalties in aid of other objectives, weighing the public interest in one form of relief against the other.[23] In contrast, precisely because the private party has no direct stake in the penalty, allowing a private party to seek civil penalties puts the private party in the position of compromising those penalties in favor of its own private interests.

Neither Petitioner nor Amicus United States has thus far suggested any federal precedent for allowing a private party to obtain a remedy—whether for civil penalties or otherwise—that provides no benefit to that party.[24]

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[23] The specific illustration of such a compromise in the public interest, theorized by the Court in *Gwaltney,* is apt to the facts of this case. The Court asked the reader to suppose that

> the Administrator agreed not to assess or otherwise seek civil penalties on the condition that the violator take some extreme corrective action, such as to install particularly effective but expensive machinery, that it otherwise would not be obliged to take. If citizens could file suit, months or years later, in order to seek the civil penalties that the Administrator chose to forgo, then the Administrator's discretion to enforce the Act in the public interest would be curtailed considerably. The same might be said of the discretion of state enforcement authorities.

484 U.S. at 60-61.

[24] There are rare situations where that might be permitted, and none of them is without controversy. For example, where a party has successfully obtained an injunction, an unrelated private attorney may be appointed by the court to enforce the injunction through a criminal contempt action, even though the penalty on the contemnor would be paid to the court rather than as damages to the party itself. *See Young v. United States ex rel. Vuitton et Fils S.A.,* 481 U.S. 787, 809 (1987). But this example appears

Thus, allowing a party to pursue relief in which it has no personal stake puts the federal court in the position of resolving an issue about which there is no case or controversy. To the extent that the Court must reach the issue in this case, it should hold that a private plaintiff has no cognizable legal interest in pursuing any claim for civil penalties under Section 505 of the Clean Water Act.

B. If A Court May Impose Civil Penalties In A Citizen Suit, It Only Can Do So As An Adjunct To A Proper Injunction

In *Gwaltney*, the Court assumed that a civil penalty might properly be exacted in a citizen suit, presumably as a form of relief ancillary to the main action to enjoin the violation. 484 U.S. at 58-59.

That view may be based on the idea that once the court has jurisdiction over one "case" or "controversy" the court may make findings involving the same basic facts and issue a judgment assessing penalties payable to the public treasury. In other words, assuming a live controversy before the court, and a substantial overlap between the plaintiff's injunction suit and the showing necessary to justify the imposition of penalties, one might entertain extending the court's jurisdiction to "tax" penalties on behalf of the United States at the same time that it issues an injunction. This might occur, for example, where the alleged violation continued unabated up until trial.

This approach is difficult to justify. It would involve broadening jurisdiction in a manner quite different than with other forms of "supplemental jurisdiction." For example, prior to codification of the supplemental jurisdiction concept in 28 U.S.C. § 1367, under theories of pendent or ancillary jurisdiction, the federal courts' authority was extended to the entirety of a case, notwithstanding that the court would not independently have jurisdiction over each claim in that case. *See United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966). However, the situation hypothesized here would involve assuming jurisdiction over claims that are *beyond* the constitutional jurisdiction of the federal courts.

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closely tied to the need for the court to enforce its own orders. There may be other examples, but they are scarce, and almost certainly do not address a grant of authority of the type conferred by the Clean Water Act.

If, however, this Court concludes that it is permissible for a citizen-plaintiff to obtain a civil penalty judgment in some circumstances, the minimum requirement must be that no civil penalty be awarded absent the issuance of an injunction. Once it is clear that an injunction will not issue, the plaintiffs no longer have an interest in the controversy sufficient to sustain the jurisdiction of the federal court. Similarly, it would be improper (where the penalty rests on a deterrence rationale) to award penalties at a point in time when the court can plainly determine that violations have ceased.

To be sure, plaintiffs' mere pursuit of an injunction would indeed provide the court with continuing jurisdiction over the claim for the injunction. But to allow a court to issue civil penalties to any party that simply pursues an injunction would engender frivolous or unnecessary appeals (or arguments in the district court) in pursuit of an equitable remedy to which the plaintiffs are not entitled. Petitioners in this case acted quite properly by abandoning on appeal an effort to obtain an injunction that they presumably felt they could not win. If the court's authority to grant a penalty depends upon it having continuing jurisdiction over an injunction claim, an award of penalties can only be made as an adjunct to a proper and fully sustainable injunction granted to the

plaintiff. Accordingly, when the district court here found the injunction unwarranted, it likewise should have denied the request for an enhanced penalty. To find otherwise would allow the provisions of the Clean Water Act to trump Article III principles.

Disregarding the priority of Article III requirements, Petitioners and their Amici maintain that the deterrent force of the Clean Water Act is best served by making civil penalties available readily in citizen suits. They contend that it would undermine the Act to allow a defendant to avoid both an injunction and civil penalties simply by bringing itself into compliance with the Act. In so aguing, Petitioners confuse the general purposes of the Act with the more limited purpose of the citizen suit. Certainly, the main purpose of the Act is to ensure compliance with our nation's environmental laws. Primary enforcement of the Act, including pursuit of penalties, is the responsibility of federal, state and local agencies. *See Gwaltney*, 484 U.S. at 60. The role of the citizen suit is, at best, "supplementary" and "interstitial." *Id.* at 60-61. The citizen suit's primary purpose is to provide a mechanism by which the citizen can seek a halt to continuing violations of the Act that cause the citizen harm. The "harm sought to be addressed by the citizen suit lies in the present or the future, not in the past." *Id.* at 59. That is the purpose of the notice provision, which gives the alleged violator the opportunity to bring itself into compliance and thereby obviate the citizen suit entirely. *See id.* at 60. If the violations are abated, there was, in Congress' view, no reason to allow the action.[25] An injunction is a powerful remedy. Pursuant to Federal Rule of Civil Procedure 65, for example, district courts may

[25] Moreover, civil penalties still can be imposed in an action brought by the state, federal and local officials primarily responsible for enforcement of the Act.

issue a preliminary injunction at the very outset of the case to prevent harm to the plaintiffs.[26]

Of course, were we to assume that civil penalties might still be awarded at the end of the case as an adjunct to a proper injunction, even less can be made of Petitioners' public policy argument. If, by abating violations, a firm can avoid not only an injunction but also civil penalties, this would provide a powerful incentive to bring itself into compliance with the Act. Such a result is consistent with the Act's primary purpose.

III. THE DISTRICT COURT LACKED JURISDICTION TO GRANT ANY REMEDY TO PETITIONERS

As noted above, the court of appeals properly held that the case could not continue consistent with the requirements of Article III. As shown below, the district court lacked jurisdiction over Petitioners' case from the outset.

A. Petitioners Had No Standing To Obtain Equitable Relief Because There Was No Harm To The Environment

The district court found "no demonstrated proof of harm to the environment" arising from the mercury discharge violations. JA 162. The absence of harm to the environment precludes a finding of either Article III standing or a finding of an ongoing violation that is a statutory prerequisite to seeking equitable relief.[27] The elements of standing

[26] In fact, the district court denied a preliminary injunction and Petitioners did not appeal that denial.

[27] The state consent decree entered before the suit began, mandated compliance with the mercury restrictions and required Laidlaw to continue to seek a technical solution. The district court ultimately found that Laidlaw had been forced to suspend its operations in 1992 in order to avoid violating the decree. JA 92-93.

> are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation. . . . And at the final stage, those facts (if controverted) must be "supported adequately by the evidence adduced at trial."

Lujan, 504 U.S. at 561 (internal citations omitted) (quoting *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 115 n.31 (1979)).

Petitioners failed to prove standing at trial. They alleged adverse environmental effects from Laidlaw's discharges in violation of its NPDES permit. But after hearing testimony from various experts and DHEC officials and reviewing nine years of objective biological data from the North Tyger River, the district court found "that prior mercury discharge limits *as high as 20 ppb* had *no adverse effect* on the indigenous biological community in the North Tyger River downstream from Laidlaw's facility." JA 157 (emphasis added).[28] The district court specifically found that "the water quality standard for mercury is currently being attained in the North Tyger River and . . . the overall quality of the river exceeds levels necessary to support propagation of fish, shellfish, and wildlife, *and recreation in and on the water*." JA 156 (emphasis added).[29]

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[28] Indeed, the court found that using Petitioners' choice of an EPA value range for environmental harm demonstrated only that the "water quality-based effluent standard was exceeded and not that any health or environmental harm resulted from that exceedance. . . . The plaintiffs' use of the 1-10 value range constitutes an acknowledgment that the NPDES permit violations at issue in this citizen suit ***did not result in any health risk or environmental harm***." JA 161 (emphasis added).

[29] This finding undermined Petitioners' standing allegation based on lessened recreational activities. *See Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 1999 U.S. App. LEXIS 11201 (4th Cir. 1999) (plaintiffs were not injured, and therefore lacked standing, because evidence failed to establish adverse environmental impact); *Public Interest Research Group of New Jersey v. Magnesium Elektron, Inc.*, 123 F.3d 111, 121 (3d Cir. 1997) ("reduction in a person's recreational activity cannot support the injury prong of standing when a court also concludes that a polluter's violation of an effluent standard has not harmed the affected waterway and that it, in fact, poses no threat to that waterway").

Nor do the reporting and monitoring violations provide standing to seek equitable relief. Without more, an asserted "need" for information cannot satisfy Article III requirements. *See, e.g., Foundation on Econ. Trends v. Lyng*, 943 F.2d 79, 84-85 (D.C. Cir. 1991) (if "informational injury" alone were sufficient "a prospective plaintiff could bestow standing upon itself in every case"). Rather, there must be some material nondisclosure or environmental consequences traceable to the failure to report. There was none here. The district court found that:

> The monitoring and reporting violations proven to have occurred were a combination of anomalies interfering with properly installed detection equipment, instances where the detection equipment malfunctioned, and technical errors on reporting forms that even DHEC recognizes were a result of confusion as to how to properly complete the forms. These deficiencies were not the result of a failure either to install proper monitoring equipment or to submit timely DMRs.
>
> * * * *
>
> In this case, Laidlaw's monitoring and reporting deficiencies, all of which have long since been resolved, *produced no direct environmental impact*. There has been no demonstrated proof of harm to the environment.

JA 162 (emphasis added). Thus, correct monitoring and reporting would have provided plaintiffs with no addi-

tional information. In any event, a research interest in Laidlaw's report, without some interest in the effects of Laidlaw's discharges in the North Tyger River, cannot confer standing sufficient to provide Petitioners any equitable relief. *See Lujan*, 504 U.S. at 566.

B. South Carolina's Diligent Enforcement Efforts Barred Petitioners' Suit

As noted, the focus of the citizen suit provision is on the future, not the past. *Gwaltney*, 484 U.S. at 59. Moreover, the citizen suit provision was designed to supplement, not supplant, government action. *Id.* at 60. Thus, a court may not entertain a citizen suit where the State is diligently prosecuting an action against the defendant to "require compliance with" the relevant Clean Water Act provisions. The statute is explicit:

> No action may be commenced . . . if the . . . State has commenced and is diligently prosecuting a civil or criminal action in a court of . . . a State to require compliance with the standard, limitation, or order.

33 U.S.C. § 1365(b)(1)(B). *See also Gwaltney*, 484 U.S. at 60 ("citizen suits are proper only 'if the Federal, State, and local agencies fail to exercise their enforcement responsibility' ") (citing legislative history of Clean Water Act). An ill-conceived citizen suit could interfere with the enforcement efforts of state officials charged with primary enforcement responsibility. *See id.* at 61.

The pre-lawsuit compliance efforts of the State, through DHEC, are documented in the district court's findings. From 1986 to 1992, Laidlaw worked closely with DHEC to achieve compliance with a range of requirements including a stringent new 1.3 ppb mercury limit.[30] In September 1988, Laidlaw and DHEC executed the first consent order which required the facility to submit plans for a long range solution to address the very exceedances at issue in Petitioners' complaint. By March 1991, Laidlaw had achieved compliance with all limitations except for mercury. Thereafter, in December 1991, Laidlaw experienced a number of unexplained, abnormally high mercury discharges. JA 90. These high mercury discharges led DHEC enforcement officials to consider additional enforcement action in early 1992—before FOE mailed its 60-day notice letter to DHEC and Laidlaw on April 10, 1992. JA 90-91. The second consent decree, entered before FOE filed suit, required Laidlaw to "use every effort" to resolve the mercury problem, subjected violations to additional enforcement action, and provided continuing jurisdiction in the State court to ensure compliance. JA 82-83. As the district court found, that consent order caused Laidlaw to shut down its facility for extended periods in 1992 and to solve its mercury discharge problem. JA 92-93.

[30] By way of comparison, 2 ppb of mercury in drinking water is considered acceptable.

The record shows that Laidlaw cooperated with DHEC to achieve compliance with the Act (JA 180), and those undisputed, long-term efforts should have precluded federal jurisdiction over this case—for equitable relief or civil penalties. Petitioners focused their and the district court's attention away from DHEC's obvious oversight and enforcement *efforts* and onto the amount of the penalty imposed by the consent decree. The district court made the "amount of penalty" that DHEC had imposed the focus of its jurisdictional analysis. At that point the trial court veered off the proper § 1365(b)(1)(B) jurisdictional approach.

The district court's analysis and ultimate findings were clearly misdirected at the method the State used in assessing penalties. Because, as noted above, Petitioners had no direct interest in the award of civil penalties or their

amount,[31] their only potential interest was in assuring compliance with the law to prevent future harm to themselves. However, to be allowed even to commence a suit they must demonstrate that the State itself is not pursuing *compliance* by the permit holder. Thus, the showing of lack of diligence could only have properly been based on the State's efforts in assuring Laidlaw's *compliance* with the Clean Water Act,[32] not on second-guessing the State's assessment of penalties.

The need to focus clearly on the State's efforts to induce compliance is of special importance because of the potential that the citizen suit will interfere with state enforcement efforts. *See Gwaltney*, 484 U.S. at 60-61. In assessing state efforts under this provision, the district court may perhaps *consider* the civil penalties that were imposed by the State. But the focus must necessarily be upon whether the State agency is moving forward "to require compliance" with whatever standard, limitation, or order the defendant is asserted to be violating. That focus was clearly missing in the district court's first opinion. The district court not only focused on the wrong issues, but effectively supplanted the State's judgment with the view of an appropriate penalty espoused by Petitioners.[33] The district court

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31 Petitioners could have intervened in the state court case to challenge the $100,000 penalty or the terms of the consent decree, but elected to pursue their separate federal case.

32 *See Jones v. City of Lakeland*, 175 F.3d 410, 415 (6th Cir. 1999) ("the restrictions on citizen suits found in §§ 1365(b) and 1319(g)(6) are intended to prevent the filing of citizen actions that would be duplicative of ongoing state or federal agency action"); *North & South Rivers Watershed Ass'n v. Scituate*, 949 F.2d 552, 557 (1st Cir. 1991) (when a state agency "has specifically addressed the concerns of an analogous citizen suit, deference to the agency's plan of attack should be particularly favored").

33 The State's enforcement judgment regarding the weight afforded to "economic benefits" and its rationale for entering into a consent decree with Laidlaw was explicitly analyzed and understood by the district court, which was presented with testimony explaining that "DHEC considers economic benefit in conjunction with good-faith attempts at compliance" in assessing penalties, and that in the case of Laidlaw, DHEC did not consider it to have "obtained any significant economic benefit." JA 97.

ultimately found that the State's efforts actually produced Laidlaw's complete compliance with all requirements of the Act within months of the consent decree. JA 162-63. Accordingly, the State was sufficiently diligent to preclude federal jurisdiction over Petitioners' suit.

IV. PETITIONERS ARE NOT ENTITLED TO ATTORNEYS' FEES

A. The Attorneys' Fee Question May Not Be Ripe For Decision

Petitioners claim the right to pursue attorneys' fees on the theory that they prevailed in this litigation by prompting Laidlaw to comply with the Act.[34] However, the attorneys' fee question comes to this Court in an odd posture. The district court has not yet ruled on Petitioners' fee request, deferring consideration of such a petition.

In light of its conclusion that Petitioners had not obtained a judgment in their favor, the court of appeals held in a footnote that Petitioners could not be considered "prevailing or substantially prevailing" parties under 33 U.S.C. § 1365(d).[35] 149 F.3d at 307 n.5.

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34 Petitioners do *not* appear to lay claim to attorneys fees on the theory that they prevailed by persuading the district court to impose an enhanced civil penalty. This Court has held repeatedly that to qualify as a prevailing party, the party must at least obtain some benefit to itself. *See Farrar v. Hobby*, 506 U.S. 103, 111-12 (1992); *see also Hewitt v. Helms*, 482 U.S. 755, 760 (1987). Petitioners have no direct stake in the imposition of a civil penalty and those penalties could not provide any basis for a fee award.

35 The court of appeals relied on its opinion in *S-1 & S-2 v. State Bd. of Educ.*, 21 F.3d 49, 51 (4th Cir. 1994) (en banc) (per curiam).

The footnote addressing fees may have been intended as a disposition but is better viewed as dicta. On appeal, Laidlaw continued to question the district court's initial jurisdiction, both in terms of Petitioners' constitutional and statutory standing. *If* the district court did not have jurisdiction over this suit at the outset, then the award of attorneys' fees would be improper.

But in addressing mootness, the court of appeals *assumed* that the district court had jurisdiction at the outset. This was proper—both mootness and standing are jurisdictional and, in dismissing, the court could choose between them. But the question whether plaintiffs were entitled to attorneys' fees was undoubtedly a *merits* question. While the court of appeals may have viewed this as an easy question in light of its own precedents, *Steel Co.* teaches that jurisdictional issues must be resolved before proceeding to the merits. 118 S. Ct. at 1016. Concededly, this case presented the matter to the court of appeals in a somewhat unique posture. At a minimum, however, *Steel Co.* counsels that a court not decide an issue on the merits before addressing all jurisdictional prerequisites.

In this Court, the same considerations control. If the Court agrees that the district court had no jurisdiction, that is dispositive of the fee claim. If the Court were to decide that the district court had jurisdiction at the outset, it can proceed to review the court of appeals' footnote on attorneys' fees. If the Court elects to allow the court of appeals to address the jurisdictional questions in the first instance, *Steel Co.* suggests that this Court *not* proceed to address the fee petition on the merits.

B. Petitioners Are Not Entitled To Attorneys' Fees Under *Farrar*.

If a plaintiff must obtain a judgment or settlement in its favor in order to be deemed a "prevailing party" under *Farrar v. Hobby*, 506 U.S. 103 (1992), then Petitioners'

claim to fees must be rejected. Petitioners do not argue any contrary view. Rather, they argue that the court of appeals was wrong in rejecting the "catalyst" theory. Even if the catalyst theory is viable, however, it would not warrant a fee award in this case.

In *Farrar* the Court clearly established that a "material alteration of the legal relationship of the parties" is the prerequisite for the fee award to a "prevailing" party. *Id.* at 111 (quoting *Texas State Teachers Ass'n v. Garland Indep. School Dist.*, 489 U.S. 782, 792-93 (1989)). The Court held that "[no] material alteration of the legal relationship between the parties occurs until the plaintiff becomes entitled to enforce a judgment, consent decree, or settlement against the defendant." 506 U.S. at 113. The Court explained that

> to qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim. The plaintiff must obtain an enforceable *judgment* against the defendant from whom fees are sought, or comparable relief through a *consent decree* or *settlement*. Whatever relief the plaintiff secures must directly benefit him at the time of the *judgment* or *settlement*. Otherwise, the *judgment* or *settlement* cannot be said to "affec[t] the behavior of the defendant toward the plaintiff."

506 U.S. at 111 (emphasis added) (internal citations omitted). *Farrar* directs the result reached by the court below. *Farrar* necessarily supersedes any earlier suggestion that the informal effect of a lawsuit on defendant's behavior may render a plaintiff a prevailing party.

Only a party that has achieved some measure of enforceable relief "prevails" in the lawsuit. Petitioners' own discomfort with a defendant's proclamation that it has voluntarily ceased violating the law highlights the very significant difference between voluntarily ceasing conduct

on the one hand, and an enforceable judgment or settlement agreement on the other.

With *Farrar* as the guiding standard, this case illustrates inherent difficulties in trying to apply a "catalyst theory." Before this lawsuit was filed, Laidlaw committed itself to make "every effort" to eliminate any violations. JA 82. To the extent that any outside pressure was necessary, the State was applying that pressure, playing an active role in forcing compliance. Yet, under Petitioners' theory, one can easily imagine a trial devoted to determining whether Petitioners or the State or Laidlaw's consultants, or Laidlaw itself (which ultimately found the technical solution), was responsible for resolving the mercury problem that earlier challenged the facility. Congress could not have wanted to encourage satellite litigation over fees where the basic issue of liability for fees would be so difficult to determine. *See Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) ("A request for attorney's fees should not result in a second major litigation.").

Moreover, even assuming *arguendo* that the catalyst theory of prevailing party status has vitality, this case would take that theory farther than it could properly go, even by its own terms. To prevail under this theory, the June 12, 1992 citizen suit would have to have been responsible for bringing Laidlaw into compliance with its NPDES permit. But the two opinions of the district court make clear that the citizen suit had nothing to do with Laidlaw's compliance.

This case does not involve an NPDES permit holder and state environmental agency galvanized into action by the filing of a citizen suit. The district court's two decisions chronicle the nearly six years of continuous, pre-citizen suit activity by Laidlaw and DHEC to solve the mercury discharge problem. This included, among other things, the commencement of an enforcement action and subsequent entry of a consent order in 1988 that led to

the installation of the Lancy system, the complete elimination of non-mercury exceedances, and a process of continual experimentation with new technology that ultimately eliminated mercury exceedances.[36]

As noted above, DHEC and Laidlaw were engaged in enforcement/compliance activities *before* Petitioner mailed its 60-day notice letter on April 10, 1992. During this 60-day notice period, a formal enforcement conference was held on May 21, 1992 which led directly to a June 8, 1992 consent agreement that was then approved by a state court judge on June 10, 1992. JA 90-91, 146-47. The need to satisfy the consent decree compelled compliance. JA 92, 147 ("As the mercury problems continued to be investigated, the defendant [Laidlaw] had to simply shut down the incinerator altogether for substantial periods of time in July, August, September and November 1992, in an effort not to violate either its mercury parameter or the judicial consent order with DHEC.").

After entry of the June 8, 1992 consent decree, Laidlaw added new carbon adsorption equipment in July 1992 and installed prefilters to protect (and enhance the performance) of this equipment in January 1993. *Id.* Once Laidlaw learned how to maximize the efficiency of the new carbon adsorption equipment, the mercury problem was solved.

The record thus establishes unequivocally that the "catalyst" to compliance was a combination of DHEC's and Laidlaw's enforcement/compliance efforts. The district court so found:

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[36] Petitioners inaccurately contend that Laidlaw's mercury problems were caused by its failure to properly control its mercury feed rate. Pet. Br. 5. The suggestion that Laidlaw readily possessed the ability to avoid its permit violations by lowering the feed rate was rejected by the district court. JA 174-75.

> An open line of communication between Laidlaw and DHEC existed throughout the time period relevant to this litigation. Further, DHEC's knowledge of these problems, its enforcement efforts with respect thereto, and the agency's continued involvement with Laidlaw in achieving a solution to these problems have resulted in Laidlaw's ultimate compliance with its NPDES permit over an extended period of time.

JA 162-63. Simply stated, compliance was the product of Laidlaw's and DHEC's intervention. Petitioners are not, under any theory, entitled to recover fees and costs.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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July 19, 1999

Supreme Court, U.S.
FILED
JUN 15 1999
CLERK

(15)

No. 98-822

IN THE

Supreme Court of The United States

FRIENDS OF THE EARTH, *et al.*,
Petitioners,

v.

LAIDLAW ENVIRONMENTAL SERVICES (TOC), INC.,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

PETITIONERS' RESPONSE TO SUGGESTION OF MOOTNESS

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INTRODUCTION

Plaintiffs brought this action under the Clean Water Act, 33 U.S.C. 1251, *et seq.*, to enforce the National Pollutant Discharge Elimination System (NPDES) permit issued to respondent Laidlaw Environmental Services (TOC), Inc. ("Laidlaw"). The district court found that Laidlaw had violated the mercury limitation in its permit 489 times. *Friends of the Earth v. Laidlaw Envtl. Services (TOC), Inc.*, 956 F. Supp. 610, 613-621 (D.S.C. 1997)(J.A.158, 185-196). The district court denied plaintiffs' request for injunctive relief due to the fact that Laidlaw had achieved substantial compliance with the permit, but imposed a civil penalty to deter Laidlaw from future violations. *Id.* at 610-611 (J.A. 181-183).

Because injunctive relief was denied and the denial was not appealed by plaintiffs, the Court of Appeals for the Fourth Circuit vacated and remanded with instructions to dismiss on the ground that the case was moot based on this Court's decision in *Steel Co. v. Citizens for Better Env't*, 118 S. Ct. 1003 (1998). The court of appeals reasoned that "[b]ecause Plaintiffs have not appealed the denial of declaratory and injunctive relief, the only potential relief that may be available to redress their claimed injuries is the civil penalty imposed upon Laidlaw" and "[s]uch penalties * * * cannot redress any injury suffered by a citizen plaintiff." *Friends of the Earth v. Laidlaw Envtl. Services (TOC), Inc.*, 149 F.3d 303, 306 (Pet. App. 7a).

On March 1, 1999, this Court granted certiorari on the following questions (Br. for Pet., p. i):

> 1. Whether a citizen suit seeking civil penalties under Section 505 of the Clean Water Act is constitutionally moot under *Steel Co. v. Citizens for Better Environment*, 118 S. Ct. 1003 (1998), due to lack of redressability, where plaintiffs had standing at the time of the complaint and have shown continuing injury-in-fact but have not obtained injunctive relief.

2. Whether a citizen suit seeking civil penalties under Section 505 of the Clean Water Act is constitutionally moot under *Steel Co.*, due to lack of redressability, when the district court has rendered a declaratory judgment as to liability and the issue of liability was contested.

3. Whether plaintiffs could not be awarded attorneys' fees or litigation costs because the case was dismissed for mootness, even if the litigation was responsible for bringing the defendant into compliance with the Clean Water Act.

Pursuant to Rule 21 of the Rules of this Court, Laidlaw now files a suggestion of mootness based on its claim that it has closed its facility. Suggestion of Mootness, p. 1. Laidlaw claims that closure of the facility raises an issue of mootness in addition to the issue of mootness already before the Court. *Ibid.* Laidlaw also claims that plaintiffs raised this new issue of mootness in the Brief for Petitioners. *Ibid.*

In Part I below, we show that these are not new facts. They were argued by the parties and *amici* in the briefing on the Petition for a Writ of Certiorari. In Part II, we show that a Suggestion of Mootness in a case already held to be moot, albeit on alternative grounds, is unwarranted. In Part III, we show that the closure of the facility does not moot the case because the civil penalty continues to deter future violation of the Act by Laidlaw, as well as any successor to the permit. In Part IV, we show that even if the merits of the case are determined to be moot, the attorneys' fees issue is indisputably not moot.

ARGUMENT

I. THE CLOSURE OF THE FACILITY WAS BRIEFED BY THE PARTIES BEFORE THE PETITION WAS GRANTED

The purpose of a suggestion of mootness is to raise for the first time an issue of mootness. It is not an opportunity to raise an issue of mootness previously presented to the Court. In its Suggestion of Mootness, Laidlaw suggests that the case is moot because it closed or shut down its incinerator. Yet, both it and the *amici curiae* supporting it raised exactly this point in opposition to the Petition for a Writ of Certiorari. *See* Resp. Br. in Opp., p. 1, n.1 and p. 10; Br. of *Amici Curiae* South Carolina Chamber of Commerce, *et al.* in Support of Resp., p. 7. Plaintiffs responded at length in their Reply Brief (pp. 4-7) showing how the closure of the facility did not moot the case.

Thus, the issue that Laidlaw now presents in its Suggestion of Mootness was previously presented to this Court and this Court decided to issue a writ of certiorari. Since this Court has already determined that the closure of the facility was not a bar to the granting of certiorari, there is no basis for revisiting this issue.[1/]

[1/] In his concurring opinion in *Honig v. Doe*, 484 U.S. 305, 331-332 (1988), Chief Justice Rehnquist urged adoption of an exception to the mootness doctrine for cases "where the events which render the case moot have supervened since our grant of certiorari or noting of probable jurisdiction in the case." Here, the events which Laidlaw argues render the case moot did not supervene the grant of certiorari. Instead, the events occurred before the petition was filed and were addressed by the parties during the briefing on the petition. The circumstances here present an even stronger argument for this Court preceding to the merits than the exception urged by Chief Justice Rehnquist.

II. A SUGGESTION OF MOOTNESS IN A CASE ALREADY ADJUDGED TO BE MOOT IS UNWARRANTED

The court of appeals determined that this case was moot. 149 F.3d at 306-307 (Pet. App. 8a). Two of the three questions upon which this Court granted certiorari involve mootness. *See* Br. for Pet., p. i. Since the case has already been adjudged to be moot and since this Court will be addressing mootness pursuant to its grant of certiorari, there is no basis for a suggestion of mootness. A suggestion of mootness is for cases not previously adjudged to be moot where the circumstances have changed so as to create an issue of mootness during the pendency of the case before this Court.

That is not the situation here. Not only was the case previously adjudged to be moot, but the circumstances have not changed. As discussed above (p. 3), Laidlaw and its supporting *amici* raised this issue at the petition stage. Indeed, if Laidlaw's argument had merit, it could have raised the closure of the facility before the court of appeals since it claims that its decision to close the facility was made by June 2, 1997 (Suggestion of Mootness, p. 7), over a year before the court of appeals issued its decision on July 16, 1998.

Since the case has already been adjudged to be moot, the Suggestion of Mootness merely raises an alternative ground for the court of appeals' finding of mootness. It is not a basis upon which this Court must decline to reach the mootness issues already presented by the Petition.

Moreover, the basis for mootness presented in the Suggestion of Mootness is closely related to the mootness issues presented by the Petition. Laidlaw's Suggestion of Mootness is premised on the fact that civil penalty relief is moot when "'there is no reasonable expectation that the wrong will be repeated.'" Suggestion of Mootness, p. 3 (quoting *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484

U.S. 49, 66 (1987), which in turn was quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953)). This is the test for when injunctive relief is moot. *See, e.g., United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968); *W.T. Grant*, 345 U.S. at 633. However, this Court has not determined when civil penalty relief becomes moot. That is precisely the issue presented by this case.

In order to resolve both the merits of the mootness issues presented by the Petition and that presented in the Suggestion of Mootness, this Court must determine when civil penalty relief becomes moot in a citizen suit. More specifically, as discussed more fully below, this Court must determine the legal standard to be applied in ascertaining when a civil penalty payable to the United States Treasury provides a deterrent against future violations so as to satisfy the requirement of redressability for purposes of mootness. Thus, this Court's decision as to the issues on which the writ of certiorari was granted will significantly affect the resolution of the issue Laidlaw raises in its Suggestion of Mootness.

III. IN SPITE OF THE CLOSURE, LAIDLAW ITSELF, AS WELL AS ANY SUCCESSOR TO ITS PERMIT, WILL BE DETERRED FROM VIOLATING THE CLEAN WATER ACT

In *Steel Co.*, this Court held that civil penalties did not satisfy redressability in a case where the defendant was not violating the statute at the time of the complaint and there was no allegation in the complaint of continuing violation. 118 S.Ct. at 1017-1018. In analyzing the redressability issue relating to civil penalties, the Court emphasized that the penalties were paid to the United States Treasury rather than the plaintiff. *Id.* at 1018. This analysis suggests that general deterrence, the effect of the imposition of a civil penalty on other dischargers, does not support redressability. *See also id.* at 1019. However, in view of this Court's emphasis on the fact

that *Steel Co.* involved only initial standing and not mootness after initial standing had been shown (*id.* at 1019-1020), it is not clear whether this determination affects the present case. Assuming *arguendo* that *Steel Co.* establishes that general deterrence does not satisfy the requirement of redressability for purposes of mootness, the imposition of a civil penalty in this case provides specific deterrence.

In determining whether the penalty will deter future violations, the focus must be on Laidlaw itself, not its facility. Analysis of the specific deterrent value of a speeding ticket focuses on the driver, not on his vehicle. A speeder who has suffered the consequences of a speeding ticket is deterred from speeding regardless whether he sells or no longer drives the vehicle in which he was speeding. He is deterred when he drives another of his vehicles or when he buys and drives a new vehicle. Thus, the issue here is whether the civil penalty will serve to deter Laidlaw from violating the Clean Water Act in the future.

Even though Laidlaw has closed its facility, it continues to be deterred by the penalty imposed by the district court in several ways.

First, although Laidlaw has closed the facility and dismantled the incinerator, Laidlaw continues to hold its NPDES permit. It has not taken any action to terminate the NPDES permit. Indeed, Laidlaw admits that the permit is still active. Suggestion of Mootness, pp. 4-5 and App. B, p. 6a. Since its permit is still in effect, it has the right to discharge in the future whenever it cares to do so.

Laidlaw argues that this is not the case because it has sold or discarded its equipment. Suggestion of Mootness, p. 4. The sale or disposal of its equipment does not eliminate the possibility that Laidlaw could discharge in the future. By keeping its NPDES permit active, Laidlaw is keeping its

options open.[2/] Laidlaw could assemble other equipment and reconstitute its operation. *See Government of the Virgin Islands v. Virgin Islands Paving, Inc.*, 714 F.2d 283, 284-285 (3d Cir. 1983)(no mootness where defendants had moved the equipment out of the Virgin Islands and had ceased the offending operation because the defendants had not surrendered the lease to the property and could resume the challenged operations). The fact that Laidlaw may have to obtain permits and other government approvals before resuming operations on the site does not mean that it would not be "free to return to [its] old ways."[3/] *Concentrated Phosphate*, 393 U.S. at 203. It just may take a few more steps to get there.

Second, even if the permit is transferred to a purchaser, Laidlaw's payment of a civil penalty would serve to deter violations by the purchaser. Unlike a general deterrent as to dischargers not connected to this permit, a purchaser would be discharging under the permit which Laidlaw was penalized for violating. Laidlaw's successor, knowing that Laidlaw had been penalized for violating the permit it now holds, would be specifically deterred from repeating the same kinds of violations that caused Laidlaw to be penalized.

[2/]Laidlaw claims that it has kept its NPDES permit alive, not because it intends to discharge in the future, but "because to do so might make the site more attractive to a prospective purchaser." Suggestion of Mootness, App. B, p. 6a. It is extremely unlikely that the NPDES permit could be transferred to a prospective purchaser of the site, since the purchaser would not be purchasing an ongoing operation using the same equipment. *See* S.C. Reg. 61-9.122.61-122.62 (1996). In any event, Laidlaw's statement of its present intent cannot be controlling when it is free to change its position at any time.

[3/]In the injunction context, the test for mootness is a stringent one--injunctive relief is not moot as long as the defendant is free to return to his old ways. *Concentrated Phosphate*, 393 U.S. at 203. The remoteness of that possibility is relevant to the issue of whether injunctive relief should be granted, not whether it is moot. *Ibid.*

Third, even if Laidlaw never revived its operation at this location, it has at least has at least 16 other NPDES permitted facilities. Friends of the Earth and Sierra Club have members who use the waters affected by Laidlaw/Safety-Kleen's[4/] discharges from some of these facilities and their use and enjoyment of these waters is adversely affected by illegal discharges from these facilities. *See* Reply Br. in Support of Pet. for Writ of Cert., App. 33a. The issuance of civil penalties in this case would deter Laidlaw from violating the statute at these other facilities.

Laidlaw claims in its Suggestion of Mootness that it has no other facilities and that plaintiffs have not cited any authority for claiming that civil penalties imposed on one company might have a deterrent effect on another company. Suggestion of Mootness, p. 5. Laidlaw's argument is disingenuous. While the particular Laidlaw subsidiary that owns the South Carolina facility may not presently own any other facility, its parent corporation and sibling subsidiary corporations, all of which are wholly owned by the parent corporation (Resp. Br. in Opp., p. ii), own the other facilities. Since a civil penalty paid by a wholly-owned subsidiary reduces the profits of the parent company, a civil penalty paid by a wholly-owned subsidiary constitutes a specific deterrent for the parent and all sibling subsidiary corporations.

An appeal must be dismissed as moot when an intervening event makes it impossible for the court to grant "'any effectual relief whatever' in favor of the appellant." *Calderon v. Moore*, 116 S. Ct. 2066, 2067 (1996)(quoting *Church of Scientology of California v. United States*, 506 U.S. 9, 13 (1992)). The remedy does not need to be "'fully satisfactory'" to avoid mootness. *Ibid.* The relief still at stake here, a substantial civil penalty, is certainly effectual relief. Since the relief here provides specific deterrence against the possibility of future

[4/] Laidlaw is now doing business as Safety-Kleen. Resp. Br. in Opp., p. ii.

violations, this case is not moot.

IV. THE ATTORNEYS' FEES ISSUE IS NOT MOOT

In its Suggestion of Mootness, Laidlaw fails even to mention the attorneys' fees issue upon which this Court also granted certiorari. That issue is not affected in any way by closure of the facility.

When it vacated the district court's order and remanded with instructions to dismiss, the court of appeals decided that "[p]laintiffs' failure to obtain relief on the merits of their claims precludes any recovery of attorneys' fees or other litigation costs because such an award is available only to a 'prevailing or substantially prevailing party.'" 149 F.3d at 307, n. 5 (Pet. App. 9a, n. 5). This Court granted certiorari on the issue of "[w]hether plaintiffs could not be awarded attorneys' fees or litigation costs because the case was dismissed for mootness, even if the litigation was responsible for bringing the defendant into compliance with the Clean Water Act." Br. for Pet., p. i.

If this Court holds that the case is moot, either for the reason decided by the court of appeals or the reason set forth in Laidlaw's Suggestion of Mootness, the attorneys' fees issue is squarely presented.[5/] Laidlaw does not, and could not, argue

[5/] Plaintiffs have argued that the attorneys' fees issue should be resolved even if this Court reverses the court of appeals' ruling on mootness and holds the case not moot. Br. for Pet. 50, n. 28.

An order vacating the court of appeals' mootness decision will not eliminate the precedential value of the fees ruling since it is based on an earlier similar ruling by the court of appeals. *See* Br. for Pet., p. 43. Leaving this ruling in place when all other circuits have upheld the catalyst theory -- except the Eleventh and Federal Circuits which have not addressed the issue -- creates a situation where the Clean Water Act will not be uniformly enforced nationwide. As a result, enforcement of the Act, which heavily depends on citizen enforcement (*see id.*, pp. 35-38), would be substantially reduced in the Fourth Circuit. This, in turn, undermines Congress' intent that the Act be uniformly enforced to prevent forum shopping by dischargers seeking to avoid the requirements of the Act. *See*

the contrary. For the reasons set forth in the Brief for Petitioners (pp. 42-50), the court of appeals' ruling on the fees issue must be reversed.

CONCLUSION

For the foregoing reasons, the Suggestion of Mootness should be denied and briefing on the merits should proceed as scheduled.[6/]

Respectfully submitted,

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June 15, 1999

A Legislative History of the Water Pollution Control Act Amendments of 1972, 93d Cong., 1st Sess., vol. 1, pp. 355-356, 433, 452-453 (1973). *See also American Frozen Food Institute v. Train,* 539 F.2d 107, 129 (D.C. Cir. 1976); *American Iron and Steel Institute v. EPA,* 526 F.2d 1027, 1044 (3d Cir. 1975).

[6/]In its Suggestion of Mootness (p. 1), Laidlaw requests that the Court suspend the remainder of the briefing schedule pending disposition of the Suggestion. There is no basis for suspending briefing when the facts giving rise to the Suggestion of Mootness were previously considered during the petition stage, the mootness issue presented by the Suggestion is closely related to the mootness issue upon which certiorari was granted and the fees issue would remain.

Supreme Court, U.S.
FILED
JUN 21 1999
CLERK

No. 98-822

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FRIENDS OF THE EARTH, *et al.*,
Petitioners,

v.

LAIDLAW ENVIRONMENTAL SERVICES (TOC), INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S REPLY TO PETITIONERS' RESPONSE TO SUGGESTION OF MOOTNESS

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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This reply is submitted to address the argument set forth at page 3 of Petitioners' Response Brief that the facility closure issue had been raised and briefed at the certiorari stage of the litigation and, further, that this Court's granting of certiorari amounted to a determination that the closure of the facility did not moot the case.[1]

[1] By choosing to address this single argument, Respondent does not in any way acknowledge the validity of the Petitioners' alternative arguments.

That is an overstatement given the context in which the issue arose.

First, it should be borne in mind that there are several variations of "mootness." In *Friends of the Earth v. Laidlaw Environmental Services (TOC), Inc.*, 149 F.3d 303 (4th Cir. 1998), the Fourth Circuit reasoned that the case had become moot because the sole remedy sought by Petitioners on appeal—civil penalties—would not redress any alleged injuries. *Id.* at 305. At page 19 of its Petition for a Writ of Certiorari, Petitioners raised for the first time the issue of mootness that, under *United States v. W. T. Grant Co.*, 345 U.S. 629 (1953) and its progeny, occurs when intervening events or changed circumstances during the pendency of a case establish that there is no reasonable expectation that the alleged wrongful conduct would recur. This issue was not before the Fourth Circuit. Having just raised the issue, the Petitioners then argued that "Laidlaw could easily change its practice again at any time in the future." Petition for Certiorari at p. 19.

Respondent addressed the Petitioners' assertion at page 10 of Respondent's Brief in Opposition, stating that ". . . there is no possibility that a wrong will be repeated due to the closure of the facility." Similarly, page 7 of the brief filed by *Amici Curiae* South Carolina Chamber of Commerce *et al.* supporting Respondent, in disputing the Petitioners' assertion, noted that the ". . . facility has been in closure since August 1998 pursuant to a Consent Order entered into with DHEC." Neither brief discussed the issue in any detail.

FOE responded with several arguments on the facility closure issue, including, *inter alia*, the following at page 4 of its Reply Brief:

> 3. Laidlaw suggests that the case is moot because it has shut down its incinerator since the Court of Appeals issued its decision. Def. Opp. 1, n. 10. However, Laidlaw has submitted *no affidavit or other evidence* to support the bare statements in its brief *or any indication whether the shutdown is temporary or permanent.* Plaintiffs have ascertained that Laidlaw has not taken any action to terminate the NPDES permit. App. 33a. Since Laidlaw's NPDES permit is still in effect, it may discharge in the future whenever it cares to do so. (Emphasis added).

After Petitioners' Petition for a Writ of Certiorari was granted, essentially the same arguments were repeated at page 8, n. 7 of the Brief for Petitioners.[2]

At that point, Respondent significantly increased its focus on the facility closure issue and obtained additional information on the extent of and the circumstances surrounding the closure. The Respondent's Suggestion of Mootness followed, supported by the Affidavit of Charisse G. McLeod, which established that, for economic reasons, the Roebuck, South Carolina facility had been permanently closed, equipment removed and dismantled, and the property put up for sale. Stated otherwise, the Respondent simply addressed the criticism set forth at page 4 of Petitioners' Reply Brief regarding the absence of this type of information.

Prior to the filing of the Suggestion of Mootness, the facility closure issue had been ancillary to the issues before the Fourth Circuit and upon which Petitioners' Petition for a Writ of Certiorari was based. It was not until the Suggestion of Mootness was filed that this Court had sufficient facts to evaluate this issue. Those facts indicate unequivocally that the facility has been permanently

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[2] If, as Petitioners contend, the Court had resolved this issue by granting the Petition for Certiorari, one questions why Petitioners would address this issue post-certiorari.

closed and the NPDES discharges to the North Tyger River at issue in this lawsuit have been permanently discontinued. As noted in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 66 (1987):

> Long-standing principles of mootness * * * prevent the maintenance of suit when "there is no reasonable expectation that the wrong will be repeated." *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953). * * *

Clearly, the facts of this permanent closure more than satisfy this "reasonable expectation" standard.

CONCLUSION

For the foregoing reasons, the Suggestion of Mootness should be granted.

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INTRODUCTION

Laidlaw and its amici repeatedly claim that Laidlaw was diligently acting to bring itself into compliance and that the South Carolina Department of Health and Environmental Control ("DHEC") was vigorously enforcing Laidlaw's permit when plaintiffs, for no good reason, brought this litigation. *E.g.*, Resp't Br. 3, 5, 6-7. Nothing could be further from the truth. In fact, as of the time of plaintiffs' notice of intent to sue, Laidlaw had been violating its permit for over six years and DHEC had failed to bring an enforcement action to enforce the permit and penalize Laidlaw for its over 800 violations. Laidlaw's maximum potential penalty was in excess of $20,000,000. Pl. Pretrial Br. 29 (July 22, 1995).

After plaintiffs filed suit, Laidlaw employed the technology that the district court found it could, and should, have employed at least four years earlier. 956 F. Supp. at 599 (J.A. 155-156). Laidlaw also reduced the amount of mercury fed into its incinerator as a means of complying with its permit. *Id.* at 596 (J.A. 147). While Laidlaw had known for years that reducing the feed would reduce the severity of its violations (*see* Def. Exs. 54, 105, 144), it acted only after plaintiffs brought suit.

When Laidlaw received the notice of intent to sue from an organization well known for vigorous enforcement of the Act,[1/] Laidlaw set out to manufacture a preclusion defense. Since state suits can bar citizen suits if filed before the citizen suit (33 U.S.C. 1365(b)(1)(B)), Laidlaw sought and was able to convince DHEC to bring suit, before the 60-day notice period expired and plaintiffs could bring suit, despite DHEC's policy not to bring suit to bar citizen suits. 890 F. Supp. at 478-479 (J.A. 93-95). Laidlaw drafted DHEC's complaint, filed it and even paid the filing fee. *Id.* at 479 (J.A. 94). At the same time

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[1/] *See, e.g., PIRG and FOE v. Powell Duffryn Terminals Inc.*, 913 F.2d 64, 80-83 (3d Cir. 1990)(injunction and statutory maximum penalty over $4,000,000 imposed); *PIRG and FOE v. Witco Chemical*, D.N.J., Civ. No. 89-3146 (injunction and $10,000,000 penalty through a consent judgment).

that it filed the complaint, Laidlaw filed a consent decree settling the suit. *Ibid.*

When plaintiffs brought suit three days later, Laidlaw moved to dismiss. Although the district court rejected plaintiffs' allegation of collusion, it found that plaintiffs' suit was not barred under 33 U.S.C. 1365(b)(1)(B) because DHEC had not diligently prosecuted Laidlaw when it acceded to Laidlaw's request to be sued. 890 F. Supp. at 498 (J.A. 136). In addition to the unusual and accelerated procedures which denied plaintiffs an opportunity to intervene and participate in DHEC's suit, the district court found that DHEC's action was not diligently prosecuted because the consent decree did not even include an injunction requiring Laidlaw to comply with the law. 890 F. Supp. at 480, 489-490, 498 (J.A. 97, 117-120, 156). The district court also found DHEC's action lacking in diligent prosecution because the civil penalty imposed was too lenient under DHEC's penalty policy and failed to provide an adequate deterrent because it was too small even to remove the economic benefit Laidlaw enjoyed as a result of its noncompliance. *Id.* at 479-481, 491-492 (J.A. 95-98, 121-123).

Laidlaw and its amici seek to cast plaintiffs and other citizens as the villains rather than the victims of Laidlaw and other polluters' unlawful conduct. However, Congress has decided that "no one has the right to pollute – that pollution continues because of technological limits, not because of any inherent right to use the nation's waterways for the purpose of disposing of wastes" (S. Rep. No. 414, 92d Cong., 1st Sess. 42 (1971)) and that citizens play an integral part in ensuring that the Act's objective of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters" is achieved (33 U.S.C. 1251(a); S. Rep. No. 50, 90th Cong., 1st Sess. 28 (1985)).[2/] Plaintiffs submit that it is against this

[2/]To the extent that there have been any abuses of the citizen suit provision, that is a matter for Congress to address. In any event, the issues in this case have nothing to do with the abuses alleged by amici.

background that this Court should decide the issues in this case.

ARGUMENT

I. PLAINTIFFS' PENALTY CLAIM IS NOT MOOT

A. *Gwaltney*, Not *Steel Co.*, Is Controlling

Laidlaw argues that the court of appeals properly dismissed this case on mootness grounds because plaintiffs were only pursuing civil penalty relief in which they had no personal stake. Resp't Br. 10. Laidlaw has no answer to the significance of this Court's decision in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation,* 484 U.S. 49 (1987). Like the court of appeals, Laidlaw assumes that the decision in *Steel Co. v. Citizens for Better Environment*, 118 S. Ct. 1003 (1998), decided the issue presented in this case. Resp't Br. 10-13. Laidlaw fails, like the court of appeals, to reconcile the court of appeals' decision with the decision in *Gwaltney*.[3/] Presumably, Laidlaw has not done so because it is impossible.[4/]

[3/]Amicus Hercules argues (p. 17) that *Gwaltney* is not controlling on the issue of mootness because this Court has previously held that it is not bound by questions of jurisdiction that have been passed on in prior decisions *sub silentio*. All four of the decisions cited are easily distinguished. Three, *Webster v. Fall*, 266 U.S. 507, 511 (1925), *Hagans v. Lavine*, 415 U.S. 528, 533 n. 5 (1974), and *Pennhurst State School & Hosp. v. Halderman,* 465 U.S. 89, 119 (1984), involved situations where the issue was not raised or briefed in the case asserted as precedent. That is not the case in *Gwaltney*. Both standing and mootness were raised in the briefing (*see* Pet. App. 37a-43a) and addressed by this Court. Since mootness was addressed by the Court and the case was remanded for further action by the court of appeals, this Court necessarily determined that *Gwaltney* was not moot. In the fourth case, *Illinois State Bd. of Elections v. Socialist Workers Party,* 440 U.S. 173, 180-181, 182 (1979), stating that "summary affirmances have considerably less precedential value than an opinion on the merits," this Court rejected use of a summary affirmance as precedent for anything other than the "precise issue[] presented * * *." Since *Gwaltney* was an opinion on the merits, it has full precedential value.

[4/]Laidlaw points to the statement in *Linda R.S. v. Richard D.,* 410 U.S.

B. The Penalties Imposed Benefit Plaintiffs because They Deter Laidlaw from Violating the Act

Laidlaw argues that plaintiffs have no personal stake in civil penalties because they are paid to the Treasury, not to plaintiffs. Resp't Br. 10. Laidlaw maintains that plaintiffs lack a personal stake because civil penalties cannot be "equated" with an injunction that "bars" the conduct that harms plaintiffs. *Id.* pp. 11, 21. However, the issue is not whether civil penalties are equal to an injunction or bar the defendant's conduct. Instead, the question is whether the relief requested serves to redress the plaintiffs' injury.

Laidlaw admits that penalties deter future violations. Resp't Br. 21. Laidlaw fails to explain why a civil penalty that serves to deter future misconduct is insufficient to provide plaintiffs with a personal stake. Where plaintiffs have made and proven an allegation of continuing violation,[5/] both injunctive relief and civil penalties protect the plaintiff from future misconduct by the defendant.

614, 619 (1973), that "in American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another" as support for its position that citizens have no interest in the exaction of penalties payable to the Treasury. Resp't Br. 19-20. This statement has no relevance here. *Linda R.S.* involved the standing of a woman seeking an order requiring the district attorney to prosecute the father of her illegitimate child for failure to provide child support. 410 U.S. at 615-616. The Court held that "given the special status of criminal prosecutions in our system," the plaintiff lacked standing. *Id* at 619. Although not technically a separation of powers issue involving branches of the federal government, the case raised analogous concerns about citizens using the judicial branch to force the executive branch to exercise its prosecutorial discretion. Such concerns are not at issue here.

[5/] A continuing or ongoing violation is a term of art in construing citizen suit provisions in environmental statutes, including the Clean Water Act. It means an ongoing violation at the time of the complaint. *Gwaltney*, 484 U.S. at 64-66. It is not restricted, as amici have suggested, to a state of violation at the time the district court awards relief.

This Court has stated that civil penalties are an alternative to injunctive relief in ensuring compliance with the Act. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 314 (1982). *See also United States v. Midwest Suspension and Brake*, 824 F. Supp. 713, 738 (E.D. Mich. 1993), aff'd, 49 F.3d 1197 (6th Cir. 1995)(citing *Weinberger*, court explained that it denied an injunction because the penalty imposed was designed to deter future violations). Laidlaw admits that injunctive relief deters violations and therefore provides redressability. Resp't Br. 10, 11, 15, 21. In fact, civil penalties are an even better deterrent to future permit violations than injunctive relief because the negative financial impact on the violator is more immediate from civil penalties. For example, if there are two violators with the same types of violations and one is enjoined and another is assessed a civil penalty, the violator assessed a penalty is more likely to be deterred from future violations because he has suffered an economic loss designed to remove the economic advantage he has gained from his noncompliance. Three factors work to deter his future violations: (1) the sting of paying the civil penalty, (2) the realization that he cannot benefit economically from noncompliance, and (3) the fear that any penalty for further violation is likely to be more significant (*see* 33 U.S.C. 1319(d)(history of violation to be considered in assessing a penalty)).

In comparison, the violator who has been enjoined has not suffered an economic loss for his noncompliance. He has actually enjoyed an economic benefit. During the life of the injunction, his compliance is secured through the threat of a monetary payment in the form of a contempt sanction. However, civil contempt allows the court only to threaten the violator with a future penalty if he violates the permit again.[6/] Thus, the violator who paid the penalty suffered a more

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[6/] Criminal contempt is rarely imposed. Plaintiffs know of no violation of an injunction under the Clean Water Act ever being punished through criminal contempt.

immediate and significant financial impact and is more likely to be deterred from further violations. Presumably, that is why Congress decided that the statute should be enforced through civil penalties of up to $27,500 per violation. 33 U.S.C. 1319(d); 40 C.F.R. §19.4 (1999).

In a twist of logic, Laidlaw argues that civil penalties serve to deter only when there is the threat that they will be imposed and that the specific deterrent effect is lost once the penalties are exacted. Resp't Br. 20-21. However, "specific or special deterrence aims to change a particular individual's behavior through negative reinforcement." *Bae v. Shalala,* 44 F.3d 489, 494 (7th Cir. 1995). Negative reinforcement occurs through the payment of the penalty, not the fact that the statute threatens a civil penalty for violation. *See* Block, *The Deterrent Effect of Antitrust Enforcement*, 89 J. Pol. Econ. 429, 443-444 (1981). A penalty that is on the books, but never enforced, obviously provides no deterrent at all.[7/]

C. Closure of the Facility Does Not Moot this Case

Laidlaw contends that this case is moot because the facility is shut down. Resp't Br. 24. Plaintiffs have shown that Laidlaw has deliberately retained its NPDES permit and therefore has the legal right to resume discharging at any time it chooses to do so. Pet'r Resp. to Sugg. of Mootness, pp. 6-7. Moreover, Laidlaw has recently violated its permit. Under its permit, Laidlaw continues to be responsible for filing monitoring

[7/] EPA has recognized the effect of civil penalties in removing the incentive for dischargers to violate the law (Pl. Ex. 108, p. 3):

> The first goal of penalty assessment is to deter people from violating the law. Specifically, the penalty should persuade the violator to take precautions against falling into noncompliance again (specific deterrence) and dissuade others from violating the law (general deterrence). Successful deterrence is important because it provides the best protection for the environment. In addition, it reduces the resources necessary to administer the laws by addressing noncompliance before it occurs.

reports. Laidlaw has failed to file one of the required reports. App. 12a-13a. In June 1999, the State issued a notice of violation for the delinquent report. App. 12a. At the very least, this violation establishes that plaintiffs' claim based on monitoring and reporting violations is not moot.

Even if Laidlaw never resumes discharging at the facility, Laidlaw and its corporate affiliates own at least four other facilities which have recently violated their NPDES permits. App. 14a-15a. Plaintiffs have members whose interests in the involved waterways have been harmed by these unlawful discharges. App. 12a, 16a-17a. The penalty imposed by the district court will therefore serve as a specific deterrent to this violator from committing such violations in the future.[8/]

[8/] If closure of the facility moots review of the court of appeals' judgment by this Court, this Court should vacate the court of appeals' judgment and restore the judgment of the district court. A party is entitled to retain the benefit of the judgment entered in his favor by the district court where further review of the court of appeals decision reversing that judgment cannot be had by virtue of the actions of his adversary. *Walling v. James V. Reuter, Inc.*, 321 U.S. 671 (1944). In *Walling*, the district court entered judgment for the plaintiff, the court of appeals reversed and certiorari was granted. *Id.* at 672. While the court of appeals' judgment was under review by this Court, the defendant corporation dissolved. *Id.* at 672-673. This Court determined that although it could not review the judgment due to mootness, it could "make such disposition of the whole case as justice may require." *Id.* at 677. "By reason of [the defendant's voluntary dissolution], the judgment of the Circuit Court of Appeals, which is not final because the case is pending in this Court, cannot rightly be made the implement for depriving petitioner of the benefit of his judgment in the District Court." *Ibid.* Accordingly, this Court vacated the court of appeals judgment and restored the district court judgment so that the plaintiff was free to take whatever action was available to enforce the judgment of the district court. *Id.* at 677-678. Here, justice requires that Laidlaw not be allowed to deprive plaintiffs of the district court judgment, and thus avoid the civil penalties imposed for its unlawful conduct, as a result of its action to close the plant before final review of the court of appeals' judgment could be had. *See also U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 24-25 (1994).

II. PLAINTIFFS' DECLARATORY JUDGMENT CLAIM IS NOT MOOT

Plaintiffs have shown that their injuries were redressed by the district court's issuance of a declaratory judgment. Pet'r Br. 40-42. Laidlaw responds that the plaintiffs' obtaining of a declaratory judgment does not prevent the case from being moot because plaintiffs received only a "judicial statement that does not affect the relationship between the plaintiff and the defendant" which is not equivalent to a declaratory judgment. Resp't Br. 18 (quoting *Hewitt v. Helms*, 482 U.S. 755, 761 (1987)). However, unlike in *Hewitt*, the finding of liability in this case changed the legal relationship between the parties because the district court declared that Laidlaw had violated its permit and hence the Clean Water Act. This is clearly more than simply an "incidental" judicial statement because it collaterally estops Laidlaw from arguing in the future that the same kinds of discharges are not violations of its permit.

III. PLAINTIFFS HAVE STANDING

Laidlaw argues that even though the court of appeals' decision was correct, the district court lacked jurisdiction from the outset of the case because plaintiffs lacked standing. Resp't Br. 35-38. Laidlaw appealed the district court's finding on standing, but the court of appeals did not reach the issue because it concluded that the case was moot. Certiorari was not sought or granted on this issue. Since the issue was not reached by the court of appeals and it involves questions of fact, it would be appropriate for this Court to remand this issue to the court of appeals. *E.g., Ruhrgas v. Marathon Oil Co.*, 119 S.Ct. 1563, 1572 n. 8 (1999)(remanded for review of personal jurisdiction); *Carden v. Arkoma Assoc.*, 494 U.S. 185, 197 (1990) (remanded for review of diversity jurisdiction); *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 62 n. 2 (1976) (remanded for determination of whether one plaintiff had standing to challenge portion of the Act where

other plaintiffs were found to lack standing); *Tunstall v. Brotherhood of Locomotive Firemen & Enginemen*, 323 U.S. 210, 214 (1944) (remanded for consideration of other jurisdictional questions).[2/] In the event that this Court reaches this issue rather than following its practice of remanding under these circumstances, plaintiffs show below that they have Article III standing.

A. Citizens Have Standing to Pursue Civil Penalties

Laidlaw contends that, under this Court's decisions, it is doubtful that citizens ever have standing to seek civil penalties since they are payable to the U.S. Treasury. Resp't Br. 29. Under this Court's decisions in *Gwaltney* and *Steel Co.*, there is no doubt that citizens have Article III standing to pursue civil penalties where they have alleged an ongoing violation and seek injunctive relief even if injunctive relief is ultimately denied. In *Gwaltney*, a case identical to this case in all relevant aspects, this Court found standing where the plaintiffs had alleged an ongoing violation, sought an injunction and been denied an injunction and the only relief viable at the time the case reached this Court was the civil penalty. 484 U.S. at 64-66. The petitioner in *Gwaltney* had raised exactly the issue presented by Laidlaw, arguing that "it would appear that penalties payable to the Treasury can *never* redress injury to citizen plaintiffs * * *" (emphasis in original). Pet. App. 40a. The standing determination in *Gwaltney* was reaffirmed in *Steel Co.* 118 S.Ct. at 1011.

In *Steel Co.*, the briefing on the issue of whether the plaintiff could satisfy the redressability prong of the constitutional standing test also addressed the issue raised by Laidlaw. *See* Pet'r Br. 37-42 and Resp't Br. 27-38, *Steel Co.*, 118 S.Ct. 1003

[2/] Laidlaw also claims that the issue of preclusion involves jurisdiction. Resp't Br. 35, 38. However, preclusion is a question of whether plaintiffs have a cause of action under the statute. *Steel Co.*, 118 S. Ct. at 1010-1014.

(1998)(No. 96-643). This Court did not hold in *Steel Co.* that civil penalties may never be awarded to citizens due to a lack of redressability. It held that civil penalties do not satisfy the requirement of redressability where the citizen did not allege a continuing violation and thus there was no threat of future violation for the penalties to deter. 118 S. Ct. at 1018-1020. If the Court had intended *Steel Co.* to foreclose all civil penalties in citizen suits, it surely would have stated so in clear terms and explained that it was overruling *Gwaltney*.[10]

B. Plaintiffs Have Shown Injury-in-Fact

Laidlaw argues that plaintiffs lack standing because there is no demonstrated proof of harm to the waterway. Resp't Br. 35. Injury-in-fact for standing does not require demonstrated proof of harm to the environment. Instead, it requires proof of "*a harm suffered by the plaintiff*" (emphasis added). *Steel Co.*, 118 S.Ct. at 1016. In *Sierra Club v. Morton*, this Court stated that the injury would be felt only by those who use the park in question and "for whom the aesthetic and recreational values of the area will be lessened by the highway and ski resort." 405 U.S. 727, 735 (1972). The Court further said (*id.* at 740):

> The requirement that a party seeking review must allege facts showing that he is himself adversely affected * * * * does serve as at least a rough attempt to put the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome.

In *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), this Court said that "the plaintiff must have suffered an 'injury in fact' * * *" in order to have standing. The Court looked at whether the plaintiffs, not the wildlife they sought to protect,

[10] In the alternative, Laidlaw contends that even if citizens have standing to pursue civil penalties, penalties may be awarded to citizens only as an adjunct to injunctive relief. Resp't Br. 32. Since this Court dealt with that issue in *Gwaltney* as well, there is no need to address this argument separately.

would be injured. *See id.* at 561-567. Citing *Sierra Club v. Morton*, the Court in *Lujan* said: "Of course, the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing." 504 U.S. at 562-563. Plaintiffs have therefore satisfied the injury-in-fact requirement if they show that their enjoyment of the waterway has been lessened.

Plaintiffs have done exactly that. They have shown that their members use or would use the river and that their enjoyment of such use is adversely affected or interfered with as a result of Laidlaw's excessive mercury discharges – some more than 1,000% over the permit limit. J.A. 185-196. For example, CLEAN member Judy Pruitt lives approximately one-quarter mile from Laidlaw's facility. Pruitt Aff. ¶2. She enjoys outdoor activities with her family including fishing, hiking and picnicking. *Id.* ¶3. Although she would like to undertake these activities on or near the river downstream of Laidlaw's discharge because it is close to her home, she avoids undertaking these activities there because of Laidlaw's discharge of mercury and other harmful pollutants. *Ibid.* Although she frequently eats fish, she does not eat fish caught in the river downstream of Laidlaw's discharge because she is afraid that the fish contain mercury and other contaminants discharged by Laidlaw. *Id.* ¶4. If the river were cleaner, she would use the river for these activities. *Id.* ¶¶3, 8. Her efforts to work with DHEC to enforce Laidlaw's NPDES permit were consistently frustrated by DHEC's unwillingness to force Laidlaw to comply with its permit. *Id.* ¶7. Ms. Pruitt's interests in the river are clearly interfered with by Laidlaw's unlawful discharges. *See also* Pet'r Br. 6.

The injury-in-fact test recognizes the fact that plaintiffs often suffer economic injuries based on the public perception, rather than concrete proof, that a body of water has been harmed by pollution. For example, CLEAN member Gail Lee testified that her home, which is near Laidlaw's facility, has a lower value

than similar homes located further away from Laidlaw's facility. Lee Aff. ¶¶2, 4. FOE member Kenneth Lee Curtis likewise testified that Laidlaw's unlawful discharges have "negatively affected the property value of his home" which is approximately one-half mile from the facility. Curtis Aff. ¶¶2 8. Angela Patterson testified that she and her husband would like to purchase a home in Roebuck near the river, but will not do so because of the pollutants discharged by Laidlaw. Patterson Aff. ¶9. These perceptions are hardly unreasonable in view of the fact that mercury is an "extremely toxic pollutant." 956 F. Supp. at 601 (J.A. 160). Perceptions like that of Ms. Patterson and her husband, regardless of demonstrated proof of harm, result in injury to the economic interests of homeowners like Ms. Lee.

This Court has made clear that proof of harm to the waterway from the illegal discharges is not needed for standing. In *Weinberger*, *supra*, a citizen suit under the Water Act, this Court proceeded on the issue of whether the district court should have enjoined continued operations pending receipt of an NPDES permit, even though the district court found no harm to the waterway. *See* 456 U.S. at 307-320. This Court would not have proceeded without standing. *See Steel Co.*, 118 S.Ct. at 1009-1016. Therefore, demonstrated proof of harm to the waterway is not a requisite for standing.

Moreover, Congress has determined that all pollutant discharges are harmful. In enacting the Clean Water Act, Congress prohibited the discharge of all pollutants. 33 U.S.C. 1311(a). However, recognizing that it would not be possible to eliminate all pollutant discharges immediately, Congress provided for phased elimination, whereby increasingly more stringent restrictions on discharges are imposed as technology advances. *See* 33 U.S.C. 1251(a) and 1311. In a dissent to a recent Fourth Circuit decision holding that plaintiffs in a citizen suit under the Water Act had not suffered injury-in-fact and therefore did not have standing, Chief Judge Wilkinson stated

(*FOE v. Gaston Copper Recycling Co.*, 1999 WL 351165 *11-12, reh'g granted, Aug. 3, 1999):[11/]

> Gaston Copper's permit violations ipso facto pose a concrete threat to the receiving waters within the range of its discharge, including the lake on Shealy's property. By establishing that Gaston Copper is polluting Shealy's nearby water source, CLEAN has proven an increased risk to its member's downstream uses. This threatened injury is sufficient to provide injury in fact.
>
> The majority would, however, require evidence that it can touch and feel before it is willing to acknowledge Shealy's threatened injury. But the Constitution does not require Shealy to wait until his lake becomes "barren and sterile" or assumes an "unpleasant color and smell" before he may seek relief in court. Nor must Shealy produce tests to prove that his injury is imminent. Indeed, he cannot -- for if an injury is threatened it by definition has not yet occurred.
>
> Citizens can rely on circumstantial evidence such as proximity to polluting sources, predictions of discharge influence, and past pollution to prove injury in fact, just as they would to prove any other contested issue. To require Shealy to fish individual copper molecules out of his lake and haul them into court serves no useful purpose, spawns complicated litigation, and undermines the protections Congress sought to provide in the Clean Water Act. [internal citation and footnote omitted]

Even if proof of harm to the waterway from Laidlaw's discharges was required, there is such proof here. First, permit limitations are generally based on available technology. 33 U.S.C. 1311(b). However, when necessary to protect a body of water, permit limitations, more stringent than those based on

[11/] The United States joined with the plaintiffs in *Gaston Copper* to urge the Fourth Circuit to rehear that case *en banc*. *See* App. 1a-10a.

technology, are established in order to meet ambient water quality standards. 33 U.S.C. 1312(a). Ambient water quality standards are designed to protect the nation's waters and support designated uses of waterways.[12/] *See* 33 U.S.C. 1312, 1313. Since water quality based permit limitations are designed to ensure that the receiving water meets the ambient water quality standards, any violation of a water quality based limitation harms the receiving water. *PIRG v. Powell Duffryn Terminals, Inc.*, 720 F. Supp. 1158, 1162 (D.N.J. 1989), aff'd in part and rev'd in part on other grounds, 913 F.2d 64 (3d Cir. 1990).

Laidlaw's mercury limitation is water quality based.[13/] 956 F.

[12/]The designated uses of the North Tyger River are fishing and propagation of a balanced indigenous aquatic community of fauna and flora, primary and secondary contact recreation, drinking water supply, and agricultural and industrial uses. S.C. Reg. 61-68 G(8).

[13/]Laidlaw and its amici repeatedly refer to the fact that the mercury limitation in Laidlaw's permit was relaxed from 1.3 ppb to 10 ppb during the litigation in the district court and suggest that this demonstrates that plaintiffs' suit was unfounded because Laidlaw would have committed very few violations when its violations are compared to the 10 ppb limitation. *E.g.*, Resp't Br. 7 n. 3. They fail to mention that when DHEC changed Laidlaw's maximum daily limit from 1.3 ppb to 10 ppb, it also imposed for the first time a monthly average mercury limit. 956 F. Supp. at 596 (J.A. 148). The monthly average limit DHEC imposed was 1.25 ppb. *Ibid.* The record shows that if the 1.25 ppb monthly average limit had been in Laidlaw's permit since 1987, Laidlaw would have violated its permit on 282 *more* days than it actually did. *Compare* Pl. Ex. 151 (showing 711 days of violation based on an assumed monthly average permit limit of 1.3 ppb) and Pl. Ex. 131 (showing 60 additional days of violation based on an assumed monthly average permit limit of 1.25 ppb) *with* 956 F. Supp. at 600, 621 n. 10 (J.A. 158, 196 n. 10) (showing 489 days of violation based on the actual 1.3 ppb daily maximum limitation). *See also Chesapeake Bay Foundation v. Gwaltney of Smithfield*, 791 F.2d 304, 313-315 (4th Cir. 1986), vacated on other grounds, 484 U.S. 49 (1987), on remand, 844 F.2d 170 (4th Cir. 1988), judgment reinstated, 688 F. Supp. 1078 (E.D. Va. 1988), aff'd in part, rev'd in part on other grounds, 890 F.2d 690 (4th Cir. 1989).

Supp. at 595 (J.A. 146). Plaintiffs' expert calculated the mercury level in the river from 1987 to 1992 using the mercury discharged by Laidlaw and the river's flow. 1993 Tr., vol. II, pp. 194-195; Pl. Ex. 88, pp. 11-12. He determined that Laidlaw's discharges alone (not considering any other sources of mercury in the river) caused the mercury in the river to exceed the water quality standard at least 134 times, by as much as three times the allowable level. 1993 Tr., vol. II, pp. 195-196; Pl. Ex. 88, p. 12. His testimony was unrebutted. Since the water quality standard was set at the level needed to protect the river and its designated uses, the numerous violations of the standard harmed the river.[14/]

Although Laidlaw wants this Court to believe that the change from 1.3 ppb to 10 ppb is significant, this change actually was of very little, if any, importance from the standpoint of Laidlaw's compliance. Despite the apparent large increase in the amount of mercury that could be discharged on a particular day, this change did not allow Laidlaw to increase significantly its total mercury discharge. This is because the 1.25 ppb monthly average limitation is now the controlling factor in Laidlaw's discharge of mercury. Under the 1.25 ppb limit, the most mercury Laidlaw can discharge in a month and remain in compliance with its monthly average limit is 37.5 ppb (1.25 ppb x 30 days), which is less than the 39 ppb it could discharge in a month under its old permit (1.3 ppb x 30 days). If Laidlaw has only one day at or near its 10 ppb daily maximum limit, it will have used up a substantial portion of its total monthly mercury discharge allotment and will have to keep its discharge below 1.25 ppb on the remaining days of the month to avoid violating its monthly average limitation.

[14/]The district court found, in discussing the significance of Laidlaw's violations as part of its penalty assessment, that "the water quality standard for mercury is *currently* being attained in the North Tyger River and * * * the overall quality of the river exceeds levels necessary to support propagation of fish, shellfish, wildlife, and recreation in and on the water" (emphasis added). 956 F. Supp. at 600 (J.A. 156). When that finding was made in 1997, Laidlaw had come into compliance with its permit. *See id.* at 611 (J.A. 183). It is to be expected that the water quality standard is attained if a water quality based permit limitation is complied with since the purpose of a water quality based permit limitation is to ensure that the

Second, in assessing a civil penalty, the district court is required to consider the seriousness of the violations. 33 U.S.C. 1319(d). As part of determining how much the penalty should reflect the seriousness of the violations, the district court here found that there was "no showing of any significant harm to the environment" and "no demonstrated proof of harm to the environment." 956 F. Supp. at 600, 603 (J.A. 157, 164). Laidlaw relies on such statements by the district court in the penalty assessment to support its argument that plaintiffs lack standing. *See* Resp't Br. 35-36. These findings do not show an absence of harm to the waterway. They only show that there was no showing of harm to the waterway significant enough to justify an increase in the penalty to be assessed.[15/]

ambient water quality standard is met.

The district court's finding is not inconsistent with its finding that plaintiffs have standing. The relevant facts for standing are those that existed at the time the lawsuit was filed. *E.g., Lujan,* 504 U.S. at 569 n. 4. Laidlaw violated its mercury limitation 123 times in 1992, the year this suit was filed. 956 F. Supp. at 600 (J.A. 158). Dr. Bell concluded that the water quality standard for the river was violated in 1992. Pl. Ex. 88, Table 6. Since the water quality standard was not being attained when this suit was filed, the river was being harmed.

[15/]Laidlaw and its amici refer to the fact that the district court found that plaintiffs' selection of the value range of 1-10 from EPA's civil penalty policy constituted an acknowledgment by plaintiffs that there was no risk of environmental harm. Resp't Br. 36 n. 28. *See* 956 F. Supp. at 601-602 (J.A. 161). Plaintiffs recommended to the district court that it rely on EPA's penalty policy to guide its assessment of the seriousness of Laidlaw's discharge violations. *Ibid.* Plaintiffs proposed that, from EPA's "value range" of 1-10 for violations of water quality based discharge limitations, a value of 10 be assigned to each of Laidlaw's violations. Pl. Pretrial Br. 41 (July 22, 1995). Plaintiffs proposed that the district court use the value range for violations of water quality based discharge limitations because it was the only range from the policy having any relationship to this case. *See* Pl. Ex. 129, p. 9. The other ranges are for interference with drinking water supplies, risks to subsistence fishing, fish kills, beach closings and a general range of other impacts on the aquatic environment. *Ibid.* Plaintiffs recommended that the district court use 10, the highest value

The district court found that there was "no *demonstrated* adverse affect on the environment" from Laidlaw's discharges (emphasis added). 956 F. Supp. at 603 (J.A. 164). This does not mean that there was no adverse effect on the environment. Congress has determined that all pollutant discharges are harmful and affect our ability to "restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). The district court's finding merely means that none of the evidence available proved specific adverse effects.[16/] The difficulty, indeed often the impossibility, of making such a demonstration was what lead Congress totally to revamp the regulation of water pollution in 1972 by shifting the focus of regulation from the water body to the end of the discharge pipe. Congress made this shift because of the uncertainty of the relationship between water bodies and pollutant loadings and the difficulty of being able to prove that a particular source was responsible for particular conditions in the waterway. *See* S. Rep. No. 414, *supra,* pp. 7-8, 42; S. Rep. No. 233, 98th Cong., 1st Sess. 2-3 (1983). To require a citizen seeking to invoke federal court jurisdiction to prove as a preliminary matter that the receiving waters were significantly

from the range, based on the fact that Laidlaw's excessive discharges were numerous, consistent and caused the water quality standard to be exceeded. Pl. Pretrial Br. 41-44. The district court held that plaintiffs' selection of the value range of 1-10 constituted an acknowledgment that there was no risk of environmental harm. 956 F. Supp. at 601-602 (J.A. 161). However, a value range of 1-10, although lower than the range EPA selected for other types of harm, assumes environmental harm and a value of 10 obviously assumes more harm than a lower value within this range. *See* Pl. Ex. 129, p. 9.

[16/]The district court's finding that there was a lack of proof showing an adverse affect is entirely different than the finding in *PIRG v. Magnesium Elektron Inc.,* 123 F.3d 111, 122-123 (3d Cir. 1997), that the evidence affirmatively showed no harm from the discharge. In this case, there has been no overall study of the impact of the discharge. Instead, there are only limited tests, none of which demonstrated an adverse affect.

harmed by a particular discharger would mean that citizens could not sue to protect and maintain waters, particularly those that are still relatively clean.[17/]

IV. PLAINTIFFS ARE NOT PRECLUDED FROM BEING AWARDED ATTORNEYS' FEES EVEN IF THIS CASE IS HELD TO BE MOOT

A. *Farrar* Did Not Overrule the Catalyst Rule

This Court has recognized the catalyst rule -- *i.e.*, the rule that a plaintiff has prevailed for purposes of obtaining attorneys' fees when a lawsuit has been a catalyst for a voluntary change in a defendant's conduct. *See* Pet'r Br. 44-46. Laidlaw argues that *Farrar v. Hobby*, 506 U.S. 103 (1992), "necessarily

[17/]Plaintiffs also have standing to pursue the monitoring and reporting violations for which the district court found Laidlaw liable. The NPDES system, which regulates discharges until technology is sophisticated enough to eliminate all discharges, is predicated on self-monitoring. S. Rep. No. 414, *supra*, pp. 42, 62. Each NPDES permit requires the permitholder to monitor its discharges in a specified manner and to report the results of such monitoring to the regulatory authorities. 33 U.S.C. 1318, 1342(a)-(b). Those authorities, in turn, are required to make the monitoring information available to the public. 33 U.S.C. 1318(b). Laidlaw's failure to comply with the monitoring and reporting requirements of its permit denied plaintiffs and their members information about the levels of pollutants being discharged into the river in their community. Plaintiffs' members have asserted that they are interested in obtaining correct information about the pollutants discharged into the river so that they can make decisions regarding their use of the river and its environs. *See, e.g.*, Lee Aff. ¶8; Patterson Aff. ¶11. This Court has recognized that an individual who is denied information to which he has a statutory right has suffered an injury-in-fact and has standing to sue. *Federal Election Comm'n v. Akins*, 118 S. Ct. 1777, 1784 (1998).

Laidlaw focuses on the district court's finding regarding the seriousness of the monitoring and reporting violations and argues that since there was not "some material nondisclosure or environmental consequence traceable to the failure to report," standing does not exist. Resp't Br. 37. The district court's findings regarding the seriousness of these violations for purposes of determining the appropriate penalty for the violations is irrelevant to Article III standing.

supersedes" the line of decisions recognizing the catalyst rule because *Farrar* spoke in terms of a "judgment or settlement." Resp't Br. 43. Laidlaw fails to explain why the Court would have overruled the catalyst rule in a case where that rule was not at issue or without making it clear that it was doing so. *See* Pet'r Br. 46-47. Laidlaw also fails to address the decisions of ten Circuits finding that *Farrar* did not overrule the catalyst rule. *See id.* at 48-49.[18/]

Laidlaw argues that the catalyst rule may require a "satellite litigation." Resp't Br. 44. However, the Circuits that apply the catalyst rule have made the straightforward factual determination required by the catalyst rule -- *i.e.*, whether a change in a defendant's behavior was brought about by a lawsuit or some other factor -- and have expressed no concerns about doing so.

B. Whether this Lawsuit Was a Catalyst Should Be Decided in the First Instance by the District Court

Laidlaw contends that, even if the catalyst rule is intact, this lawsuit was not a catalyst for it to comply with its permit. Resp't Br. 44-46. That factual determination should be made in the first instance by the district court. Plaintiffs simply seek

[18/]Laidlaw argues that, if this Court remands to the court of appeals for a determination of whether there was standing at the outset of the litigation, it should not rule on the fees issue at this time. Resp't Br. 42. However, if the Court affirms the court of appeals' decision on mootness, a ruling on standing will be necessary only as an antecedent to a ruling on fees. *See ibid.* It would be a waste of judicial resources for this Court to remand for a ruling on standing since the court of appeals will rule against plaintiffs as to fees regardless of its determination on standing based on its earlier decision that citizens are not entitled to fees when a case becomes moot. Instead, if the Court decides against plaintiffs as to mootness, plaintiffs submit that the Court should consider the fees issue and remand for a ruling on standing only if it rules for plaintiffs on the fees issue. *Cf. U.S. Bancorp*, 513 U.S. at 21-22 (a federal appellate court may rule on ancillary matters even when it has determined that Article III jurisdiction is lacking).

a ruling reversing the decision of the court of appeals that plaintiffs are precluded from any recovery of attorneys' fees if their claims are moot.

Laidlaw suggests that the district court has already determined that this lawsuit was not a catalyst for Laidlaw's compliance. Resp't Br. 45-46. Since the district court has not ruled on plaintiffs' entitlement to attorneys' fees (*see* Resp't Br. 7), it could not possibly have made that determination.

Laidlaw quotes a portion of the district court's relief decision stating that enforcement efforts made by DHEC led to Laidlaw's "ultimate compliance with its permit over an extended period of time." Resp't Br. 46 (quoting J.A. 163). That quotation has been taken out of context. The district court was addressing the seriousness of Laidlaw's reporting and monitoring violations and, in that context, found that those violations did not interfere with DHEC's enforcement efforts. *See* 956 F. Supp. at 602 (J.A. 161-163). The court was not addressing the issue of whether this lawsuit was a catalyst for Laidlaw's compliance. *Id.* at 602-603 (J.A. 162-163).

Moreover, as we have shown above (pp. 1-2), the district court has found that DHEC's enforcement efforts were inadequate.

CONCLUSION

It is respectfully submitted that the decision of the court of appeals should be reversed and the case remanded for consideration of the issues presented in the parties' appeals to that court.

Respectfully submitted,
Bruce J. Terris
Carolyn Smith Pravlik
Monica Wagner
James S. Chandler, Jr.

Counsel for Petitioners

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 98-1938

Friends of the Earth, Inc. and Citizens Local Environmental Action Network, Inc.

Plaintiffs/Appellants,

v.

Gaston Copper Recycling Corp., et al.

Defendant/Appellant.

ON APPEAL FROM THE UNITED STATES COURT FOR THE DISTRICT OF SOUTH CAROLINA

BRIEF OF THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF REHEARING EN BANC

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[Tables of contents and authorities omitted]

INTEREST OF THE UNITED STATES

Pursuant to Fed. R. App. P. 29(a), the United States files this amicus curiae brief because this case presents an issue of substantial importance to the United States. The United States, in cooperation with the individual States, has primary responsibility for implementing and enforcing the Clean Water Act (CWA), 33 U.S.C. § 1251 et seq. The United States is also a potential defendant in citizen enforcement actions against federal facilities. See CWA § 309, 33 U.S.C. § 1319. The present case concerns the ability of citizens to establish standing to sue under the Act. The standard set forth in the panel's opinion would significantly restrict citizens' ability to enforce the environmental laws. Thus, the resolution of this case will have a direct and substantial effect on enforcement of the Act.

SUMMARY OF ARGUMENT

Congress intended to grant citizens standing to sue under the Clean Water Act to the full extent permitted by the Constitution. By imposing unduly stringent evidentiary burdens on the citizen-plaintiffs, the panel's analysis thwarts this Congressional intent and irreconcilably conflicts with decisions in other circuits.

As to injury in fact, the panel effectively required direct evidence of injury, disregarding the circumstantial evidence of injury proffered by the plaintiffs. In doing so, it ignored the rule that a plaintiff may ordinarily rely on circumstantial evidence to make a showing required by law, and disregarded applicable authority from the Supreme Court and other circuits.

As to traceability, the panel improperly insisted that plaintiffs provide scientific evidence as to the transport of pollutants. It declined to credit the plaintiffs' evidence, which relied on reasonable inferences and circumstantial proof. This holding conflicts with precedent from other circuits.

The effect of the panel opinion is to require plaintiffs to present substantial amounts of scientific evidence unrelated to their case in order to establish standing. This will lead to "expensive, lengthy sideshows to the straightforward issue under the Clean Water Act - namely, whether a defendant is violating its discharge permit." Slip op. at 9 (dissenting opinion of Chief Judge Wilkinson).

ARGUMENT

I. CONGRESS INTENDED THAT CITIZENS HAVE STANDING TO SUE UNDER THE CLEAN WATER ACT TO THE FULL EXTENT PERMITTED BY THE CONSTITUTION

The text of the Clean Water Act permits suit by "any citizen," which is defined to mean "a person or persons having an interest which is or may be adversely affected." 33 U.S.C. § 1365(a), (g). The language of this provision was drawn from the Supreme Court's decision in Sierra Club v. Morton, 405 U.S. 727, 740 (1972), which required that a plaintiff "allege facts showing that he is himself adversely affected" by the challenged decision. See H.R. Conf. Rep. No. 92-1465 at 146 (1972) (stating that Congress had based the language of section 1365(g) on Sierra Club v. Morton). Thus, in drafting the Clean Water Act's citizen suit provision, it appears that Congress intended to extend the citizen suit remedy as far as the Constitution permitted.[1] The Supreme Court reviewed the foregoing legislative history in Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 16-17 (1981), concluding that the language of section 1365 was intended to allow suit by a "broad category of potential plaintiffs." See also Lujan v. Defenders of Wildlife, 504 U.S.

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[1] Although the Court's decision in Sierra Club v. Morton involved an interpretation of the text of the Administrative Procedure Act, the Court made clear that it was informed by constitutional considerations. See id. at 740 & n.16.

555, 580 (1992) (Kennedy, J., concurring) ("In my view, Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.").

Extending citizen standing under the Act to the limits permitted by the Constitution is also necessary to effectuate the Act's other purposes. As appellants explain in detail in their petition for rehearing en banc, an important reason for the Clean Water Act's shift from water quality standards to end-of-pipe standards was to eliminate the need to address questions of causation and injury in enforcement proceedings. See Petition for Rehearing En Banc at 6-9.

II. THE PANEL IMPROPERLY REQUIRED PLAINTIFFS TO PROFFER DIRECT EVIDENCE IN ORDER TO ESTABLISH INJURY IN FACT

As to injury in fact, the panel demanded that plaintiffs either provide scient studies of the waters used by plaintiffs, see op. at 6 (noting th sence of "toxicity tests, or test or studies of any kind," of those waters), or show an "observable negative impact" on those waters or the surrounding ecosystem. Op. at 6. This requirement, which effectively barred the plaintiffs from proving injury in fact through circumstantial evidence, lacks any basis in applicable law.

It is permissible for a plaintiff to base a showing of injury in fact (or some other element of standing) on reasonable probabilities or inferences. Plaintiffs need not necessarily adduce direct evidence, and may instead rely on circumstantial evidence in establishing standing, as they may in making any other legally required showing. See United States Postal Service v. Aikens, 460 U.S. 711, 714 n.3 (1983) (in rejecting a requirement of direct evidence in an employment discrimination case, stating that plaintiff could elect to rely on circumstantial evidence alone, "[a]s in any lawsuit."). In criminal cases, the government may rely on circumstantial evidence to show guilt

beyond a reasonable doubt. See 2 Charles A. Wright, Federal Practice and Procedure § 411 at 479-86 (1982). Circumstantial evidence thus must necessarily be admissible in making the substantially lesser showing required for standing.

For example, in Duke Power Co. v. Carolina Env. Study Group, 438 U.S. 59 (1978), the Supreme Court found that plaintiffs who lived near a nuclear power plant could establish injury in fact without requiring any direct proof of injury. The Court found that that plant's emissions of waste heat into lake waters created injury, and that "the emission of non-natural radiation into appellees' environment would also seem a direct and present injury, given our generalized concern about exposure to radiation and the apprehension flowing from the uncertainty about the health and genetic consequences of even small emissions like those concededly emitted by nuclear power plants." Id. at 74. Notably, the Court did not require plaintiffs to show that the air and water they used actually contained radiation; it sufficed that radiation had been emitted in their vicinity and caused reasonable concern about health effects.

Likewise, in Sierra Club v. Cedar Point Oil Co., 73 F.3d 546 (5th Cir. 1996), citizen-plaintiffs asserted that defendant's discharge of oil-contaminated water to Galveston Bay was likely to cause harm to the Bay, and showed that they actually used the Bay, but produced no direct scientific or visual evidence of harm to the waters they used. The Fifth Circuit nevertheless found that citizen-plaintiffs had standing to sue. See id. at 557-58.[2]

Reliance on circumstantial evidence is especially appropriate in light of the general rule that "the threshold for the injury

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[2] One of citizen-plaintiffs' standing witnesses stated that he had observed "discolored water and foul odors." Id. at 557. However, the Fifth Circuit did not rely on the testimony of this witness because he did not "express[] an interest in the part of Galveston Bay where Cedar Point's discharge is located." Id. at 558 n.24.

requirement is fairly low." See id. at 557 n.23 (stating that "CWA cases from other circuits corroborate" this observation). Indeed, as the Third Circuit has said, in order to establish standing an injury "need not be large[;] an identifiable trifle will suffice." Public Interest Research Group v. Powell Duffryn Terminals, Inc., 913 F.2d 64, 72 (3d Cir. 1990) (citation omitted).

The panel also erred in disregarding plaintiffs' claim that they were subject to threatened injury. The evidence in this case focuses on the downstream transport of pollutants from defendant's facility. Many of the factors that may influence the rate of this transport, such as weather, are subject to natural variation. Standing law does not require that a plaintiff wait until actual injury occurs in order to sue. Instead, a plaintiff can sue on the basis of threatened harm, so long as the threat is "real and immediate, not conjectural or hypothetical." See generally Los Angeles v. Lyons, 461 U.S. 95, 101-02 (1983); see also Village of Elk Grove Village v. Evans, 997 F.2d 328, 329 (7th Cir. 1993) (finding standing because "[t]he Village is in the path of a potential flood" and "even a small probability of injury is sufficient to create a case or controversy").

III. THE PANEL IMPROPERLY DECLINED TO CONSIDER A COMMON-SENSE ANALYSIS OF TRACEABILITY, INSISTING INSTEAD ON SCIENTIFIC EVIDENCE

The panel found that plaintiffs had not shown that the pollutants in defendant's wastewater could travel four miles to affect the lake used by witness Wilson Shealy. The panel instead demanded better evidence, presumably in the form of scientific testimony. This finding was inconsistent with applicable caselaw, which permits a court to draw the reasonable conclusion that pollutants will travel such a short distance.

The traceability prong of the standing analysis requires only

that plaintiff show that its injury "fairly can be traced to the challenged action." Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41 (1976). This demands that plaintiffs show a "substantial likelihood that defendant's conduct caused plaintiff's harm"; this "is not equivalent to a requirement of tort causation." Powell Duffryn, 913 F.2d at 72. "In a Clean Water Act case, this likelihood may be established by showing that a defendant has 1) discharged some pollutant in concentrations greater than allowed by its permit 2) into a waterway in which the plaintiffs have an interest that is or may be adversely affected by the pollutant and that 3) this pollutant causes or contributes to the kinds of injuries alleged by the plaintiffs." Id. The panel cited this standard, but found that its second element was not met because plaintiffs had not shown that Gaston Copper's discharges had reached Shealy's lake. Slip op. at 7. The panel emphasized that the lake is four miles downstream of Gaston Copper's facility, and said that "even though water flows downstream, the distances between the source of the alleged pollution (Gaston Copper) and the waterways used by [plaintiff's standing witnesses are] simply too great to infer causation." Id.

The panel cited no authority for the proposition that four miles downstream is too far to infer traceability for the discharge by this defendant's facility. In fact, authority from other circuits strongly supports a finding of traceability. In several cases, including one in this Circuit, courts have found that citizens' group had standing to sue on the basis of a member's claim that he or she used a body of water in the general area of the discharge, but without requiring any showing that the member used the precise spot at which the discharge occurred. See Sierra Club v. Simkins Industries, Inc., 847 F.2d 1109, 1113 (4th Cir. 1988) (Patapsco River); see also Cedar Point Oil Co., 73 F.3d at 556, 558 n.24 (Galveston Bay); United States v. Metropolitan St. Louis Sewer District, 883 F.2d 54, 56 (8th Cir. 1989) (Mississippi River); Friends of the

Earth v. Consolidated Rail Corp., 768 F.2d 57, 61 (2d Cir. 1985) (Hudson River); see also Friends of the Earth, Inc. v. Chevron Chemical Co., 900 F. Supp. 67, 75 (E.D. Tex. 1995) (specifically finding that plaintiffs could sue on the basis of discharges two to four miles upstream from them). Many of these cases involved quite large bodies of water; nevertheless, these courts drew the reasonable inference that waterborne pollutants migrate, without demanding scientific proof that they had done so. Without distinguishing these cases, the panel in this case effectively demanded scientific proof of traceability.[3/]

Moreover, the panel ignored plaintiffs' evidence of traceability beyond simple proximity to Gaston Copper's facility. The waters of Shealy's lake have been tested, and found to contain the contaminants discharged by Gaston's facility. Although the tests involved were conducted before Gaston assumed ownership of the facility, they indicate that

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[3/] The panel cited the "thirty-one intervening ponds" between Gaston Copper's facility and Shealy's lake. Slip op. at 7. However, since these ponds taken together fit within a four-mile span, many of them are presumably quite insubstantial. In any case, the intervening ponds and creeks taken together are likely trivial in comparison to, for example, the Mississippi or Hudson River. Nor would the "three other tributaries" the panel cited as flowing into Shealy's lake necessarily do more than dilute Gaston Copper's pollutants.

It is true that, as the Fifth Circuit has said, "some waterways covered by the [Clean Water Act] may be so large that plaintiffs should rightfully demonstrate a more specific geographic or other causative nexus" in order to show standing. Cedar Point Oil Co., 73 F.3d at 558 n.24; cf. Lujan v. National Wildlife Federation, 497 U.S. 871, 889 (1990). The Fifth Circuit has found, for example, that a plaintiff could not assert standing solely on the basis of use of "a body of water located three tributaries and 18 miles downstream" from defendant's refinery, where plaintiff had offered no other evidence of injury. See Friends of the Earth v. Crown Central Petroleum, 95 F.3d 358, 361 (5th Cir. 1996). Here, by contrast, plaintiff is much closer to the source of the emissions, and has offered abundant additional evidence of injury.

pollutants discharged by Gaston's facility migrate to Shealy's lake. Since there is no evidence that the facility's operations have changed substantially, see slip op. at 11, it is reasonable to conclude that pollutants from Gaston Copper's facility have continued to reach Shealy's lake. Plaintiffs also presented a state official's statement that Gaston Copper's discharges travel to a water body 16.5 miles downstream, and evidence that Gaston Copper's discharges have polluted the lake adjacent to its facility.[4/]

The panel opinion's insistence on direct evidence of injury and rigorous proof of causation is contrary to well established law on standing. As the Third Circuit said in Powell Duffryn, "[a] plaintiff need not prove causation with absolute scientific rigor." 913 F.2d at 72. This circuit has endorsed that proposition. See Natural Resources Defense Council, Inc. v. Watkins, 954 F.2d 974, 980 n.7 (4th Cir. 1992). In the words

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[4/] Plaintiffs also presented evidence that Gaston Copper has repeatedly violated the terms of its permit and that Gaston Copper's discharges have many times been found in scientific tests to be toxic to small aquatic animals. Slip op. at 10. Together with the evidence that Gaston Copper's discharges were capable of traveling downstream to Shealy's lake, this amounts to significant circumstantial proof of injury in fact. Because plaintiffs did present proof of injury in fact, this case is readily distinguishable from Public Interest Research Group v. Magnesium Elektron, Inc., 123 F.3d 111 (3d Cir. 1997), a case relied on by the panel's opinion in this case. In Magnesium Elektron, the court found that the defendant had shown that releases from its facility did not injure, and may indeed have benefited, the environment. See id. at 123. Here, by contrast, plaintiffs have provided unrebutted circumstantial proof of injury.

Because plaintiffs have adequately shown that Shealy's lake was threatened by Gaston Copper's discharges, it also follows that plaintiffs may pursue their monitoring and reporting claims. See slip op. at 8 n.9; Sierra Club v. Simkins Industries, Inc., 847 F.2d 1109 (4th Cir. 1988). (Such a threat is not necessarily the only basis on which a citizen may have standing to pursue monitoring and reporting claims, but it is one valid basis.)

of the dissent, "the exhaustive exposition and proof" required by the panel "will create expensive, lengthy sideshows to the straightforward issue under the Clean Water Act - namely, whether a defendant is violating its discharge permit." Slip op. at 9. These proceedings would burden the courts and, contrary to Congressional intent, diminish the ability and incentives of citizens to bring enforcement actions.

CONCLUSION

For the foregoing reasons, the United States urges this Circuit to rehear the panel's decision in this case en banc. In the event that rehearing en banc is granted, the United States requests an opportunity to submit a more detailed amicus curiae brief addressing the issues in this case.

Respectfully Submitted,

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[Certificate of compliance with Fed. R.App. P. 32(a)(7) and certificate of service omitted]

IN THE SUPREME COURT
OF THE UNITED STATES

No. 98-822

FRIENDS OF THE EARTH, INC.,
Petitioners

v.

LAIDLAW ENVIRONMENTAL SERVICES (TOC), INC.,
Respondent

AFFIDAVIT OF ALICIA M. CLARK

Pursuant to 28 U.S.C. 1746 and under penalty of perjury, I state the following:

1. I am a paralegal with the law firm of Terris, Pravlik & Millian, LLP.

2. Terris, Pravlik & Millian are counsel for petitioners in the above-captioned action.

3. I was asked to identify facilities owned by Laidlaw Environmental Services, Inc. and its subsidiaries which have been issued NPDES permits. First, I conducted a search of the EPA Permit Compliance System (PCS) database for NPDES permits issued to facilities containing "Safety-Kleen" in their name. I searched the name Safety-Kleen because Laidlaw Environmental Services is currently doing business as Safety-Kleen Corp. The search produced a list of facilities and provided an address for each.

4. I compared the names of the facilities generated by the PCS search with the names of Laidlaw Environmental Services, Inc. subsidiaries listed in Laidlaw's August 1998 10-K, filed with the Securities and Exchange Commission. For facilities

that I could not match to any of the subsidiaries listed in the 10-K, I used the addresses provided by the PCS search and compared those addresses to the facilities listed on the Safety-Kleen Corp. web-site.

5. Based on the research described in paragraph 4, I made a list of facilities I had determined were both owned by Laidlaw Environmental Services, Inc. or one of its subsidiaries and held an NPDES permit. I requested that Carpenter Environmental Associates, Inc. conduct a full search of the PCS database to determine if any of the facilities on the list I provided had recent NPDES permit violations.

6. Once Carpenter Environmental Associates, Inc. provided me with a list of facilities with NPDES permit violations, I called Brandon Hemel, the membership and database coordinator for Friends of the Earth, to request that he search the Friends of the Earth membership database and determine if there are members residing in the areas surrounding the Laidlaw facilities with violations. I also asked the Sierra Club to search its membership database and determine if there are members residing in the areas surrounding the Laidlaw facilities with violations.

7. Using the list of members provided, I contacted as many members as possible to see if they have an interest in the waterways affected by the discharges from the Laidlaw facilities with violations. Members of both organizations have interests in the waterways affected by the discharges from the Laidlaw facilities with violations.

8. Carpenter Environmental Associates' review of the PCS database showed a reporting violation by Laidlaw's Roebuck facility. On August 4, 1999, I contacted Sandra Hercey of the South Carolina Department of Health and Environmental Control. Ms. Hercey informed me that in June she had issued a Notice of Violation to the Safety-Kleen (Roebuck), Inc. facility, located in Roebuck, South Carolina. The facility failed to submit its April 1999 seven-day toxicity test report, as

required by the NPDES permit issued to the facility. The April report was due at the end of May and, as of our phone conversation Ms. Hercey had still not received the report.

Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 13th day of August, 1999.

/s/ ALICIA M. CLARK

IN THE SUPREME COURT
OF THE UNITED STATES

No. 98-822

FRIENDS OF THE EARTH, INC.,
Petitioners

v.

LAIDLAW ENVIRONMENTAL SERVICES (TOC), INC.,
Respondent

AFFIDAVIT OF BRUCE A. BELL

Pursuant to 28 U.S.C. 1746 and under penalty of perjury, I state the following:

1. I am currently president of Carpenter Environmental Associates, Inc. of Ramsey, New Jersey, an environmental science and engineering firm.

2. I have appeared as an expert witness for the petitioners in the above-captioned action.

3. My firm was contacted by Alicia Clark , a paralegal for the law firm of Terris, Pravlik & Millian, LLP, who requested that Carpenter Environmental Associates, Inc. conduct a search of the EPA Permit Compliance System database to determine if any of the facilities owned by Laidlaw Environmental Services, Inc. or its subsidiaries had recent NPDES permit violations.

4. Carpenter Environmental Associates, Inc., using the facilities NPDES permit numbers, conducted a search of the EPA Permit Compliance System database. The following four facilities had recent NPDES permit violations: Safety-Kleen Corp., Little Rock, Arkansas; Safety-Kleen Corp., Lexington, Kentucky; Safety-Kleen (Baton Rouge), Inc., Baton Rouge,

Louisiana; Safety-Kleen (Deer Park), Inc., Deer Park, Texas.

Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 10th day of August, 1999.

/s/ BRUCE A. BELL

IN THE SUPREME COURT
OF THE UNITED STATES

No. 98-822

FRIENDS OF THE EARTH, INC.,
Petitioners

v.

LAIDLAW ENVIRONMENTAL SERVICES (TOC), INC.,
Respondent

AFFIDAVIT OF BRANDON HEMEL

Pursuant to 28 U.S.C. 1746 and under penalty of perjury, I state the following:

1. I am the membership and database coordinator for Friends of the Earth.

2. I was contacted by Alicia Clark, a paralegal for the law firm of Terris, Pravlik & Millian, LLP, who requested that I determine whether Friends of the Earth had members living in the vicinity of facilities owned by Laidlaw Environmental Services, Inc. or its subsidiaries.

3. I conducted a search of the Friends of the Earth membership database and determined that there are a significant number of Friends of the Earth members living in the areas surrounding the Laidlaw facilities with recent NPDES violations.

Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 6th day of August, 1999.

/s/ BRANDON HEMEL

IN THE SUPREME COURT
OF THE UNITED STATES

No. 98-822

FRIENDS OF THE EARTH, INC.,
Petitioners

v.

LAIDLAW ENVIRONMENTAL SERVICES (TOC), INC.,
Respondent

AFFIDAVIT OF KEVIN KOSIK

Pursuant to 28 U.S.C. 1746 and under penalty of perjury, I state the following:

1. I am the Director of Member Services and Development Operations for Sierra Club.

2. Sierra Club was contacted by Alicia Clark, a paralegal for the law firm of Terris, Pravlik & Millian, LLP, who requested that Sierra Club determine whether it had members living in the vicinity of facilities owned by Laidlaw Environmental Services, Inc. or its subsidiaries.

3. I conducted a search of the Sierra Club membership database and there are many Sierra Club members living in the areas surrounding the Laidlaw facilities with recent NPDES permit violations.

Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed this 6th day of August, 1999.

/s/ KEVIN KOSIK

Supreme Court, U.S.
FILED
MAY 17 1999
CLERK

No. 98-822

In the Supreme Court of the United States

FRIENDS OF THE EARTH, INC., ET AL., PETITIONERS

v.

LAIDLAW ENVIRONMENTAL SERVICES (TOC), INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

1. Whether a citizen suit under Section 505 of the Clean Water Act, 33 U.S.C. 1365, must be dismissed as moot unless the district court orders injunctive relief.

2. Whether a citizen plaintiff is barred from recovering litigation costs under Section 505(d) of the Clean Water Act if the citizen suit is dismissed as moot.

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In the Supreme Court of the United States

No. 98-822

FRIENDS OF THE EARTH, INC., ET AL., PETITIONERS

v.

LAIDLAW ENVIRONMENTAL SERVICES (TOC), INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

The United States, in cooperation with the individual States, has primary responsibility for implementing and enforcing the Clean Water Act (CWA), 33 U.S.C. 1251 *et seq.* The United States is also a potential defendant in citizen enforcement actions against federal facilities. See CWA § 309, 33 U.S.C. 1319. The present case, in which the United States participated as amicus curiae before the district court and the court of appeals, concerns the ability of citizen plaintiffs to recover civil penalties for violations of the Act and the costs of litigation for successful enforcement actions. Its resolution will have a direct and substantial effect on enforcement of the Act.

STATEMENT

Section 505 of the Clean Water Act, 33 U.S.C. 1365, authorizes private citizens to bring civil actions to

enforce the Act's requirements. Petitioners Friends of the Earth, Inc., Citizens Local Environmental Action Network, Inc., and the Sierra Club brought this citizen suit against respondent Laidlaw Environmental Services, Inc., to enjoin Laidlaw's violations of its Clean Water Act permit. The district court found that Laidlaw had violated its permit both before and after petitioners filed their citizen suit, but had ceased the violations before final judgment. The court declined to issue an injunction but assessed civil penalties and indicated that it would award petitioners their costs of litigation in accordance with Section 505(d) of the Act. See 33 U.S.C. 1365(d). The court of appeals reversed and directed the district court to dismiss the citizen action. The court reasoned that "this action is moot because the only remedy currently available to [petitioners]—civil penalties payable to the government—would not redress any injury [petitioners] have suffered." Pet. App. 8a-9a. The court of appeals also stated that petitioners are not entitled to recover their costs of litigation because they are not "prevailing or substantially prevailing part[ies]" within the meaning of Section 505(d).

A. The Clean Water Act

The Clean Water Act creates a comprehensive program "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." CWA § 101(a), 33 U.S.C. 1251(a). As a part of that program, Section 301(a) of the Act prohibits all discharges of pollutants into navigable waters except those made in compliance with the Act. Section 402 of the Act establishes the National Pollutant Discharge Elimination System (NPDES), which authorizes the federal government and qualifying States to issue permits for controlling the point-source discharge of pollutants. See 33 U.S.C. 1311(a), 1342.

Section 402(a) provides that the Environmental Protection Agency (EPA) shall issue NPDES permits authorizing effluent discharges in strict compliance with conditions specified in the permit. 33 U.S.C. 1342(a). Section 402(b) and (c) authorizes the States to develop and administer their own NPDES permit programs and provides that EPA shall suspend issuance of federal permits upon determining that a State has adopted an adequate program. 33 U.S.C. 1342(b) and (c). If an NPDES permit holder fails to comply with the specified permit conditions, the federal and state governments may take enforcement action. CWA §§ 309, 402(b)(7), 33 U.S.C. 1319, 1342(b)(7). Section 309 of the Clean Water Act provides for a variety of government enforcement measures, including the issuance of compliance orders, 33 U.S.C. 1319(a), the initiation of civil actions for injunctive relief, 33 U.S.C. 1319(b), and the imposition of criminal, civil, and administrative penalties, 33 U.S.C. 1319(c)-(g).

Section 505 provides for citizen enforcement of the Act. See 33 U.S.C. 1365. As relevant here, Section 505(a)(1) provides that "any citizen may commence a civil action on his own behalf * * * against any person * * * who is alleged to be in violation of * * * an effluent standard or limitation under this chapter." 33 U.S.C. 1365(a)(1).[1] Section 505(b) generally bars a citizen from suing until 60 days after the citizen gives

[1] A "citizen" means "a person or persons having an interest which is or may be adversely affected." CWA § 505(g), 33 U.S.C. 1365(g), and an "effluent standard or limitation" includes a state NPDES "permit or condition thereof," CWA § 505(f), 33 U.S.C. 1365(f).

notice of the alleged violation to EPA, the relevant State, and the alleged violator, 33 U.S.C. 1365(b)(1)(A). Section 505(b) also bars a citizen from suing if EPA or the State has already commenced and is "diligently prosecuting" an enforcement action. 33 U.S.C. 1365(b)(1)(B).[2]

Once the citizen files a suit, Section 505(c) directs that the citizen must serve a copy of the complaint on the Attorney General and the Administrator of EPA, and the citizen must provide them with advance notice of any proposed consent judgment. CWA § 505(c)(3), 33 U.S.C. 1365(c)(3). The district court is empowered to enforce permit requirements and assess civil penalties, which are payable to the United States Treasury. See CWA § 505(a), 33 U.S.C. 1365(a). Furthermore, the court, "in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate." CWA § 505(d), 33 U.S.C. 1365(d).

B. The District Court Proceedings

Laidlaw operated a hazardous waste incineration facility in Roebuck, South Carolina. The facility included a wastewater treatment plant that removed pollutants from water generated by the facility's air pollution control system. Laidlaw discharged the treated wastewater into the North Tyger River. In 1986, the State of South Carolina, which administers a federally approved NPDES permit program through

[2] The citizen may intervene in the government enforcement action. See CWA § 505(b)(1)(B), 33 U.S.C. 1365(b)(1)(B). If the United States has not filed its own action, it may intervene in the citizen action. See CWA § 505(c)(2), 33 U.S.C. 1365(c)(2).

the State's Department of Health and Environmental Control (DHEC), issued a NPDES permit for Laidlaw's wastewater treatment plant. The NPDES permit limited Laidlaw's discharges of numerous pollutants and required Laidlaw to monitor and report its discharges. In particular, the permit, at that time, limited Laidlaw to a daily average maximum discharge of 1.3 parts per billion (ppb) of mercury. See *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 956 F. Supp. 588, 593-594 (D.S.C. 1997) (*Laidlaw II*) (J.A. 141-143); *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 890 F. Supp. 470, 475 (D.S.C. 1995) (*Laidlaw I*) (J.A. 86-87).

Between 1987 and 1991, Laidlaw violated the mercury limitation contained in its NPDES permit 363 times. *Laidlaw II*, 956 F. Supp. at 600, 613-619 (J.A. 158, 185-193). Laidlaw installed additional pollution control technology in 1991, but nevertheless violated the mercury limitation more than 100 times in 1992. *Id.* at 595, 619-621 (J.A. 147, 193-195). On April 10, 1992, petitioners notified Laidlaw of their intention to bring a citizen suit under Section 505 of the CWA. *Laidlaw I*, 890 F. Supp. at 477 (J.A. 91). Laidlaw promptly entered into a consent agreement with DHEC, drafted and filed a complaint on behalf of DHEC, and sought state court approval of the settlement. The state court approved the settlement on June 10, 1992, the day after the expiration of Section 505(b)'s 60-day notice period, 33 U.S.C. 1365(b). See 890 F. Supp. at 477, 478-479 (J.A. 91, 93-95). Laidlaw undertook those steps to interpose a bar to the citizen suit under Section 505(b)'s "diligent prosecution" provision, 33 U.S.C. 1365(b)(1)(B). See *Laidlaw I*, 890 F. 2d at 478-479 (J.A. 93-94). Laidlaw also continued to explore technology to curtail the mercury violations. *Id.* at 478 (J.A. 92-93).

On June 12, 1992, petitioners brought suit against Laidlaw, seeking injunctive and declaratory relief and an award of civil penalties for Laidlaw's continuing violations of its NPDES permit. Laidlaw raised its "diligent prosecution" defense, and the district court heard seven days of testimony on the matter. The court then requested and received, through a brief amicus curiae, the views of the United States on that issue. The court rejected Laidlaw's diligent prosecution defense after an extensive analysis of the substance of the settlement and the circumstances by which it was reached. *Laidlaw I*, 890 F. Supp. at 484-499 (J.A. 106-136).

The court next conducted a trial on petitioners' complaint, but the court delayed issuance of its decision in light of administrative proceedings respecting Laidlaw's permit. *Laidlaw II*, 956 F. Supp. at 596-597 (J.A. 149). The court ultimately found that Laidlaw had violated the permit's mercury limitation 489 times, including nine times after petitioners filed their complaint. *Laidlaw II*, 956 F. Supp. at 600-601 (J.A. 158); see also *id.* at 613-621 (J.A. 185-195). The court also found that Laidlaw had committed 420 monitoring violations, including 13 post-complaint violations, and that Laidlaw had committed 503 reporting violations, including ten post-complaint violations. *Id.* at 600-601 (J.A. 159).

The district court evaluated the Clean Water Act's criteria for imposing civil penalties (CWA § 309(d), 33 U.S.C. 1319(d)), and it assessed a penalty of $405,800. See *Laidlaw II*, 956 F. Supp. at 601-610 (J.A. 159-181). The court noted that the penalty amounted to less than one half of the economic benefit that Laidlaw had obtained through non-compliance, but it concluded that the "total deterrent effect" was adequate, because

"Laidlaw will be required to reimburse [petitioners] for a significant amount of legal fees and has, itself, incurred significant legal expenses." *Id.* at 610-611 (J.A. 181-182). The court refused to grant petitioners' request for injunctive relief, reasoning that an injunction was inappropriate because "Laidlaw has been in substantial compliance with all parameters in its NPDES permit since at least August 1992." *Id.* at 611 (J.A. 183).

C. The Court of Appeals' Decision

Petitioners appealed solely on the ground that the district court's penalty was inadequate, and Laidlaw cross-appealed on the grounds that petitioners lacked standing to bring the suit and that the district court had improperly rejected Laidlaw's diligent prosecution defense. Pet. App. 4a. The court of appeals did not reach any of those issues and instead concluded, after supplemental briefing, that the case was non-justiciable as a constitutional matter because the action had become moot. *Id.* at 5a.

The court observed that the Constitution's "Case[]" or "Controvers[y]" requirement, U.S. Const. Art. III, is enforced through the concept of standing, which requires plaintiffs to demonstrate that they have suffered an injury in fact, caused by the defendant's action, that can be redressed through a favorable decision. Pet. App. 6a. The court stated that "these elements must continue to exist at every stage of review" or else "the action becomes moot." *Ibid.* The court of appeals specifically "focus[ed] on the continued existence of the third element, redressability." *Id.* at 7a.[3]

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[3] The court of appeals "assume[d] without deciding that [petitioners] had standing to initiate this action and have proven a continuous injury in fact." Pet. App. 7a n.3.

The court of appeals noted that the district court had denied injunctive relief and, instead, assessed civil penalties, which are payable to the United States Treasury. Pet. App. 7a. Citing this Court's decision in *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83 (1998), the court of appeals concluded that "this action is moot because the only remedy currently available to [petitioners]—civil penalties payable to the government—would not redress any injury [petitioners] have suffered." Pet. App. 8a-9a. The court accordingly vacated the district court's decision and remanded with instructions to dismiss the action. The court additionally instructed that petitioners are not entitled to recover their litigation costs because they failed to prevail on the merits and therefore are not a "prevailing or substantially prevailing party" within the meaning of Section 505(d) of the Clean Water Act. *Id.* at 9a n.5 (quoting CWA § 505(d), 33 U.S.C. 1365(d)).

SUMMARY OF ARGUMENT

The court of appeals erred in ruling that a Clean Water Act citizen suit, brought to compel a regulated entity to comply with its NPDES permit, must be dismissed as moot if the district court concludes that injunctive relief is unwarranted. The court's ruling rests on a mistaken understanding of the Clean Water Act's citizen-enforcement provisions, CWA § 505, 33 U.S.C. 1365, and this Court's jurisprudence respecting Article III's case-or-controversy requirement.

A. This Court ruled in *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987), that Section 505 authorizes citizens to bring citizen suits to compel compliance with the Clean Water Act, but not to sue merely to punish past violations. The Court has since indicated in *Steel Co.* v. *Citizens*

for a Better Environment, 523 U.S. 83 (1998), that a private citizen would lack constitutional standing to bring a suit solely to assess civil penalties for past infractions. In this case, petitioners commenced suit to compel compliance from an entity that was in violation of its permit requirements at the time the suit was brought but that had discontinued its violations before the court entered judgment. The question, for purposes of Article III's case-or-controversy requirement, is whether petitioners' claim for relief presented a live controversy under the principles that this Court has established for determining mootness.

B. This Court applies the mootness doctrine to determine whether circumstances have changed during the course of the litigation so as to eliminate the case or controversy that the plaintiff had previously shown to exist. In answering that question, the Court has established the principle that a defendant's mere voluntary cessation of unlawful conduct does not moot a case. See, *e.g.*, *City of Mesquite* v. *Alladin's Castle, Inc.*, 455 U.S. 283, 288-289 (1982). Instead, the defendant must show that "subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* at 289 n.10 (citations omitted). The Court has indicated that those mootness principles apply to Clean Water Act citizen suits. *Gwaltney*, 484 U.S. at 66-67.

C. The court of appeals erred in failing to apply the Court's teachings in *City of Mesquite* and other decisions, which establish that a defendant's mere voluntary cessation of unlawful conduct does not automatically moot a case. The court of appeals based its determination of mootness on the fact that the district court did not provide injunctive relief. The district court had denied injunctive relief, however, as a matter of

remedial discretion and not because the case satisfied this Court's criteria for mootness. As this Court indicated in *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305 (1982), the Clean Water Act provides other remedies, including civil penalties, to compel compliance. The district court did not find that there was no reasonable prospect of future violations; it therefore could assess civil penalties, as an alternative to an injunction, to deter future violations and redress the injuries that prompted petitioners' suit.

D. Because the court of appeals erred in concluding that the district court's decision to withhold injunctive relief rendered petitioners' citizen suit moot, there is no occasion for this Court to review the court of appeals' suggestion that a finding of mootness would preclude petitioners from recovering their costs of litigation. See CWA § 505(d), 33 U.S.C. 1365(d). Under this Court's normal practice, the case should be remanded for resolution of the remaining issues that the court of appeals did not reach. Although the court of appeals appears wrong in suggesting that petitioners are not entitled to recover their litigation costs, that matter should be addressed, if it becomes necessary, through the proceedings on remand.

ARGUMENT

The Court of Appeals Erred In Holding That A Citizen Suit Must Be Dismissed As Moot Unless The Citizen Plaintiff Obtains Injunctive Relief

The court of appeals' ruling that petitioners' citizen suit is moot rests on a misunderstanding of the Clean Water Act's citizen-enforcement provisions and this Court's mootness jurisprudence. We begin by explaining the content and objectives of the citizen-enforcement provisions. We next address how this Court's

mootness doctrine operates in the context of those provisions. Finally, we show why the court of appeals erred in holding that, because the district court denied injunctive relief, the petitioners' enforcement action is moot.[4]

A. The Clean Water Act's Citizen-Suit Provisions Authorize Private Judicial Actions To Compel Dischargers To Comply With Their Discharge Permits

The Clean Water Act, like other federal environmental statutes, creates a federal-state partnership for developing environmental standards and providing for their enforcement. Among other things, the Act prohibits a facility from discharging pollutants into navigable waters unless the facility obtains a NPDES permit, which, among other things, establishes limits on the amounts of certain pollutants that may be discharged. See CWA § 402(a)(1), 33 U.S.C. 1342(a)(1); 40 C.F.R. Pt. 122; pp. 2-3, *supra*. An NPDES permit also typically imposes monitoring and reporting obligations, which require the facility to measure its discharges at prescribed times and document those measurements through publicly available discharge monitoring reports (DMRs). See CWA § 402(a)(2), 33 U.S.C. 1342(a)(2); 40 C.F.R. 122.41(j) and (*l*).

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[4] In the proceedings below, Laidlaw also contested petitioners' standing to bring suit. Like the court of appeals (see note 3, *supra*), we assume, for purposes of resolving the mootness question, that Laidlaw's permit violations have caused petitioners injury in fact. See *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 66-67 (1997) (courts may assume that standing exists to resolve whether a case has nevertheless become moot). If the Court concludes that petitioners' suit is not moot, the issue of petitioners' standing would be resolved on remand. See pp. 28-30, *infra*.

Like most States, South Carolina has obtained EPA's approval to issue and enforce NPDES permits. See CWA § 309(b) and (c), 33 U.S.C. 1342(b) and (c); 40 C.F.R. 123.1 *et seq.* EPA, as well as the issuing state agency, may enforce a state-issued NPDES permit. See CWA §§ 309(a), 402(b)(7), 33 U.S.C. 1319(a), 1342(b)(7). Congress and state legislatures have empowered those governmental entities to call upon a variety of mechanisms—including administrative penalties, judicial injunctions and civil penalties, and criminal sanctions—to compel a facility to comply with its permit and to punish permit violations. See CWA § 309(a)-(g), 33 U.S.C. 1319(a)-(g); see also 40 C.F.R. 123.27. Nevertheless, Congress has recognized, in light of the sheer size of a water pollution program requiring a permit for every point-source discharge in the Nation, that the federal and state governments cannot adequately enforce the NPDES permit program without citizen cooperation and assistance. Congress accordingly enacted Section 505 of the Clean Water Act, which empowers citizens who are adversely affected by permit violations to bring civil enforcement actions to compel compliance. See 33 U.S.C. 1365.

This Court ruled in *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987), that Section 505 allows citizens to commence citizen suits to compel compliance with the Clean Water Act, but not to sue merely to punish past infractions. The Court reasoned that Section 505(a)(1), which authorizes a citizen to sue persons "alleged to be in violation" of permit requirements (33 U.S.C. 1365(a)(1)), allows the citizen to commence suit in response to "a state of either continuous or intermittent violation—that is, a reasonable likelihood that a past polluter will continue to pollute in the future." 484 U.S. at 57. But the citizen,

unlike the federal or state government, may not bring suit simply to assess civil penalties for "wholly past violations." *Ibid.* The citizen "may seek civil penalties only in a suit brought to enjoin or otherwise abate an ongoing violation." *Id.* at 59.

This Court's decision in *Gwaltney* rested on a determination that Congress intended to authorize citizens to initiate suit only to abate violations and compel compliance. See 484 U.S. at 59-63. The Court has since indicated in *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83 (1998), a case involving the citizen-suit provisions of the Emergency Planning and Community Right-To-Know Act of 1986 (EPCRA), 42 U.S.C. 11046(a)(1), that a citizen plaintiff would lack constitutional standing to bring a citizen suit solely to assess civil penalties (payable to the government) for wholly past violations. The citizen plaintiffs in *Steel Co.* brought a citizen suit against an industrial facility that had violated EPCRA's requirements but came into compliance before the citizens filed their complaint. The citizens argued that their suit could nevertheless proceed because EPCRA, unlike the Clean Water Act, authorized citizens to obtain a judicial assessment of civil penalties for past infractions. See 523 U.S. at 86-88. The Court ruled that, even if EPCRA authorized a citizen to sue for wholly past violations, the citizens' suit must be dismissed because the citizens lacked Article III standing to seek relief that does not redress a cognizable "injury in fact" to the citizens. *Id.* at 102-110.

The Court explained that "the irreducible constitutional minimum of standing" consists of the "triad of injury in fact, causation, and redressability," which "constitutes the core of Article III's case-or-controversy requirement." 523 U.S. at 102-104. A citizen

plaintiff that simply seeks civil penalties to punish the defendant for past infractions cannot satisfy the redressability requirement because, in that situation, a payment of civil penalties to the United States Treasury does not redress any injury that the citizen suffered from the defendant's past conduct. *Id.* at 106-107. The Court expressed no doubt that the federal or state governments could bring suit to punish past violations, but a private citizen could not sue to impose civil penalties unless that relief "would likely remedy its alleged injury in fact." *Id.* at 109.

In this case, unlike *Gwaltney* and *Steel Co.*, it is clear that, even after the citizen plaintiffs filed suit, the defendant continued to violate environmental requirements. Compare *Laidlaw II*, 956 F. Supp. at 600-601 (J.A. 158), with *Steel Co.*, 523 U.S. at 88, and *Gwaltney*, 484 U.S. at 55. Nevertheless, the district court found that, within two months after petitioners filed their complaint, Laidlaw was in "substantial compliance." 956 F. Supp. at 611 (J.A. 183). The district court assessed civil penalties and attorneys fees to "provide adequate deterrence under the circumstances of this case," *ibid.* (J.A. 182), but it refused to issue an "injunction or other form of equitable relief" in light of "the fact that Laidlaw is now and has for an extended period of time been in compliance with its permit," *ibid.* (J.A. 183).

The court of appeals concluded that the district court's refusal to provide injunctive relief had critical constitutional implications. It ruled, based on an extrapolation of this Court's decision in *Steel Co.*, that the district court's denial of petitioners' request for an injunction rendered this case constitutionally moot and prohibited the district court from assessing civil penalties. Pet. App. 7a-9a. As we next explain, the court's

ruling overlooks established principles that guide how the mootness doctrine should be applied in this case.

B. A Defendant's Voluntary Cessation Of Permit Violations Does Not Moot A Citizen Suit Unless The Defendant Demonstrates That The Permit Violations Will Not Recur

The constitutional doctrines of standing and mootness each originate from Article III's specification that the "judicial Power" extends only to "Cases" or "Controversies." U.S. Const. Art. III, § 2. The doctrine of standing requires a court to ascertain that a plaintiff has demonstrated an "injury in fact," caused by the defendant's allegedly unlawful action, that can be redressed through the requested relief. See, *e.g.*, *Steel Co.*, 523 U.S. at 102-104; *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 559-560 (1992). The doctrine of mootness, by contrast, requires a court to discontinue its exercise of judicial power if it determines that a live case or controversy no longer exists in light of changed circumstances. See *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 67 (1997); *County of Los Angeles* v. *Davis*, 440 U.S. 625, 631 (1979).

The doctrines of standing and mootness are closely related because each inquires into the existence of an Article III case or controversy. See, *e.g.*, *Allen* v. *Wright*, 468 U.S. 737, 750 (1984). Indeed, this Court has suggested that mootness might be described as "'the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).'" *Arizonans for Official English*, 520 U.S. at 68 n.22 (quoting *United States Parole Comm'n* v. *Geraghty*, 445 U.S. 388, 397 (1980), and Henry P. Monaghan, *Constitutional Adjudication: The*

Who and When, 82 Yale L. J. 1363, 1384 (1973)). Nevertheless, the Court has treated the doctrines of standing and mootness as separate jurisdictional concepts and subjected them to different standards because of the distinct role that each plays, as a practical matter, in the conduct of litigation.

The Court applies the doctrine of standing as a threshold jurisdiction requirement that a plaintiff must normally satisfy to invoke the federal judicial power. See *Steel Co.*, 523 U.S. at 88-89. Because Article III's case-or-controversy requirement subsists "through all stages of federal judicial proceedings," *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 477 (1990), the plaintiff must be prepared to establish the requisites of injury in fact, causation, and redressability at each juncture where they may be called into question. The plaintiff must allege sufficient facts in the complaint to demonstrate standing. And if those allegations are disputed, the plaintiff must be prepared to come forward with sufficient evidence to withstand a motion for summary judgment and to prove those facts at trial. See, *e.g.*, *Lujan* v. *Defenders of Wildlife*, 504 U.S. at 561; *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 883-889 (1990); *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 114-115 & n.31 (1979).

The Court applies the doctrine of mootness to assess whether circumstances have changed during the course of the litigation so as to eliminate the case or controversy that the plaintiff had previously shown to exist. See *Arizonans for Official English*, 520 U.S. at 67-68. In general, "a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *E.g.*, *County of Los Angeles*, 440 U.S. at 631. A dispute may become moot as a result of changes in the underlying facts, see, *e.g.*,

Mosley v. *United States*, 119 S. Ct. 484 (1998) (per curiam) (death of the defendant mooted review of his criminal conviction); *Vitek* v. *Jones*, 436 U.S. 407 (1978) (grant of parole may moot prisoner's challenge to conditions of confinement), or the controlling law, see, *e.g.*, *United States* v. *Chesapeake & Potomac Tel. Co.*, 516 U.S. 415, 416 (1996) (per curiam) (vacating decision for determination of mootness); see also *United States Dep't of Justice* v. *Provanzano*, 469 U.S. 14 (1984) (congressional enactment mooted one issue but not the entire case).

The application of mootness principles frequently calls for a practical assessment of whether a case or controversy persists in light of the particular facts at hand. See, *e.g.*, *Murphy* v. *Hunt*, 455 U.S. 478, 482 (1982) (evaluating whether challenged conduct is "capable of repetition, yet evading review"); *Geraghty*, 445 U.S. at 400 (noting, in the class action context, the "flexible character of the Article III mootness doctrine"); see also *Honig* v. *Doe*, 484 U.S. 305, 331 (1988) (Rehnquist, C.J., concurring). See generally Robert L. Stern, et al., *Supreme Court Practice* 710-721 (7th ed. 1993) (collecting cases and secondary sources). The Court has applied mootness principles in a practical manner when defendants facing injunctive remedies urge that their voluntary cessation of allegedly unlawful actions renders the case moot. This Court has repeatedly and emphatically rejected the notion that "voluntary cessation" of the challenged conduct automatically deprives a court of the power to order relief. See, *e.g.*, *City of Mesquite* v. *Aladdin's Castle, Inc.*, 455 U.S. 283, 288-289 (1982); *United States* v. *Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968); *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 632 (1953).

The Court's decisions have established the hornbook principle that "[m]ere voluntary cessation of allegedly illegal conduct, or a statement by the defendant that it would be uneconomical to engage in any further questioned behavior, does not render moot a suit for an injunction if it is possible for the defendant to resume such conduct." Stern, *supra*, at 716; see *id.* at 716 n.21 (collecting cases). As the Court has explained:

> "Mere voluntary cessation of allegedly illegal conduct does not moot a case; if it did, the courts would be compelled to leave '[t]he defendant . . . free to return to his old ways.'"

City of Mesquite, 455 U.S. at 289 n.10 (quoting *Concentrated Phosphate Export Ass'n*, 393 U.S. at 203, and *W.T. Grant Co.*, 345 U.S. at 632). Rather, "[t]he test for mootness in cases such as this is a stringent one." *Ibid.* The defendant must show that "subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Ibid.* (quoting *Concentrated Phosphate Export Ass'n*, 393 U.S. at 203). Accord *W.T. Grant Co.*, 345 U.S. at 633 (the defendant bears the "heavy" burden of demonstrating that "there is no reasonable expectation that the wrong will be repeated").

The Court has explained that voluntary cessation "is an important factor bearing on the question whether a court should exercise its power to enjoin the defendant from renewing the practice, but that is a matter relating to the exercise rather than the existence of judicial power." *City of Mesquite*, 455 U.S. at 289. Accord *Concentrated Phosphate Export Ass'n*, 393 U.S. at 203-204 (a defendant is entitled to show "that the likelihood of further violations is sufficiently remote to make injunctive relief unnecessary") (citing *W.T. Grant Co.*, 345 U.S. at 636). "It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption." *United States* v. *Oregon State Med. Soc'y*, 343 U.S. 326, 333 (1952). Nevertheless, the determination of whether injunctive relief is warranted is a matter within the trial court's discretion. *City of Mesquite*, 455 U.S. at 289 n.10.

This Court has recognized that the foregoing principles governing mootness are directly applicable to Clean Water Act citizen suits. See *Gwaltney*, 484 U.S. at 66-67 (quoting *Concentrated Phosphate Export Ass'n*, *W.T. Grant Co.*, and *Oregon State Med. Soc'y*, *supra*). The court of appeals erred in this case by failing to take those principles into account. Specifically, the court of appeals incorrectly concluded that the district court's discretionary decision to withhold injunctive relief in the face of Laidlaw's post-complaint cessation of its permit violations necessarily rendered petitioners' enforcement action moot.

C. A Court's Decision To Withhold Injunctive Relief Does Not Constitute A Finding That The Discharger's Violations Will Not Recur

The court of appeals concluded that petitioners' citizen suit was necessarily moot because the district court refused to grant an injunction in light of Laidlaw's cessation of its permit violations and "the only remedy currently available to [petitioners]—civil penalties payable to the government—would not redress any injury [petitioners] have suffered." Pet. App. 8a-9a. The court of appeals' exclusive focus on what relief the citizen received departs from the methodology that courts normally apply in analyzing mootness. More-

over, even if the court of appeals' methodology were proper, its analysis overlooks the relationship between injunctive relief and civil penalties under the Clean Water Act, which would be an essential consideration in evaluating whether petitioners' citizen suit against Laidlaw is indeed moot.[5]

The court of appeals should have begun by applying this Court's teachings that a defendant's voluntary cessation of unlawful conduct does not automatically moot a case. See pp. 15-19, *supra*. Indeed, under those principles, Laidlaw was required to "demonstrate that it is '*absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Gwaltney*, 484 U.S. at 66 (quoting *Concentrated Phosphate Export Ass'n*, 393 U.S. at 203) (emphasis added by the Court in *Gwaltney*).

The district court did not treat petitioners' claims against Laidlaw as moot. It apparently saw no need to invoke the foregoing mootness principles, and it did not make specific findings on the question whether it was clear that Laidlaw's permit violations could not reasonably be expected to recur. The district court did deny petitioners' request for injunctive relief, which would have gone beyond a simple prohibitory injunction and imposed special reporting obligations. *Laidlaw II*, 956 F. Supp. at 611 (J.A. 182-183). But the court denied injunctive relief as a matter of equitable discretion, treating Laidlaw's compliance history as a factor bearing on the exercise of that discretion. *Ibid.* (J.A. 182-183). Specifically, the court stated that "a defendant in substantial compliance with its NPDES permit is not required to show that there is no chance of a future permit violation in order to defeat a request for injunctive relief." *Ibid.* (J.A. 182-183). The court concluded that "the fact that Laidlaw is now and has for an extended time been in compliance with its permit" supported its decision that "no injunction or other form of equitable relief is appropriate." *Ibid.* (J.A. 183).

The district court's statements respecting the appropriateness of equitable relief do not provide what a determination of mootness would require: a definitive finding that it is absolutely clear there is no reasonable prospect that Laidlaw would repeat its violations. See *Gwaltney*, 484 U.S. at 66-67. A district court can properly conclude that the prospect of recurrence is not so small as to moot a case, but is sufficiently unlikely to warrant denial of injunctive relief. See, *e.g.*, *W.T. Grant Co.*, 345 U.S. at 633, 635-636 ("although the actions were not moot, no abuse of discretion has been demonstrated in the trial court's refusal to award injunctive relief"); see generally *City of Mesquite*, 455 U.S. at 289. Indeed, that is what the district court apparently concluded here. The court imposed civil penalties expressly to "provide adequate deterrence" of future violations. *Laidlaw II*, 956 F. Supp. at 610-611 (J.A. 181-182). But it nevertheless denied injunctive relief,

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[5] The courts of appeals, other than the Fourth Circuit, have concluded under various rationales that a citizen plaintiff who proves that the defendant was in violation of a NPDES permit at the time of suit may obtain civil penalties to deter future violations, even if the violations by that time ceased. See *Comfort Lake Ass'n* v. *Dresel Contracting, Inc.*, 138 F.3d 351, 356 (8th Cir. 1998); *Atlantic States Legal Found., Inc.* v. *Stroh Die Casting, Inc.*, 116 F.3d 814, 820 (7th Cir. 1997); *Natural Resources Defense Council* v. *Texaco Refining & Marketing, Inc.*, 2 F.3d 493, 502 (3d Cir. 1993); *Atlantic States Legal Found., Inc.* v. *Pan Am. Tanning*, 993 F.2d 1017, 1020-1021 (2d Cir. 1993); *Atlantic States Legal Found., Inc.* v. *Tyson Foods, Inc.*, 897 F.2d 1128, 1135-1136 (11th Cir. 1990); *Pawtuxet Cove Marina, Inc.* v. *Ciba-Geigy Corp.*, 807 F.2d 1089, 1094 (1st Cir. 1986). See also *Carr* v. *Alta Verde Indus., Inc.*, 931 F.2d 1055, 1065 n.9 (5th Cir. 1991) (dictum).

stating that Laidlaw need not demonstrate "no chance of a future permit violation" to defeat petitioners' request for an injunction. *Id.* at 611 (J.A. 183).

We believe that the district court's actions demonstrate its understanding that petitioners' citizen suit continued to present a live controversy under the standards set out in *Gwaltney*. But if the court of appeals nevertheless believed that Laidlaw's "voluntary" compliance, by itself, may have eliminated any reasonable prospect of future violations, then the court of appeals should have remanded the case to the district court for an express finding on that matter. See, *e.g.*, *Vitek*, 436 U.S. at 410 (remanding case to the district court for consideration of the question of mootness); *McLeod* v. *General Elec. Co.*, 385 U.S. 533, 535 (1967) (directing that "the District Court should determine in the first instance the effect of an intervening event upon the appropriateness of injunctive relief"); Stern, *supra*, at 257. The court of appeals should not have based a determination of mootness on the mere fact that the district court imposed civil penalties but did not provide injunctive relief.

A district court does not necessarily transgress Article III's case-or-controversy limitation by resolving a Clean Water Act citizen suit through the imposition of civil penalties as the sole form of relief. A citizen who is aggrieved by permit violations has standing to sue to enforce the permit and thereby abate those violations. See *Gwaltney*, 484 U.S. at 65-66; *id.* at 70 (Scalia, J., concurring in part and dissenting in part). The citizen may obtain enforcement through an injunction that compels compliance. See CWA § 505(a), 33 U.S.C. 1365(a); *W.T. Grant Co.*, 345 U.S. at 633 ("The purpose of an injunction is to prevent future violations."). But as this Court explained in *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305 (1982), the Clean Water Act does not employ injunctions as "the only means of ensuring compliance." *Id.* at 314.

In *Romero-Barcelo*, citizens demanded an injunction to abate government discharges of ordnance, which qualified as a pollutant under the Clean Water Act. This Court concluded that the Clean Water Act does not "deny courts the discretion to rely on remedies other than an immediate prohibitory injunction." 456 U.S. at 316. Rather, the Court concluded that the Clean Water Act gives a court discretion to choose relief "that will achieve *compliance* with the Act." *Id.* at 318. That relief "can include, but is not limited to, an order of immediate cessation." *Id.* at 320. As Section 505(a) makes clear, a citizen may ask the district court to "apply any appropriate civil penalties under [Section 309(d), 33 U.S.C. 1319(d)]" to deter future violations. 33 U.S.C. 1365(a). See *Romero-Barcelo*, 456 U.S. at 314.[6]

The court of appeals concluded that the district court's award of civil penalties, without an injunction, dictated that the case was moot, because civil penalties —which are payable to the Treasury—"would not redress any injury [petitioners] have suffered." Pet. App. 9a. The court of appeals overlooked that peti-

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[6] Section 309(d) sets forth standards for a district court to apply in assessing civil penalties in government enforcement actions. It directs that the court may impose a maximum penalty of $25,000 per day of violation and that, when assessing the penalty, the court shall consider "the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require." 33 U.S.C. 1319(d).

tioners brought this citizen suit to compel Laidlaw to cease permit violations that, at the time the suit was filed, were allegedly causing petitioners injury in fact. If Laidlaw had failed to meet its "heavy" burden of showing that "there is no reasonable expectation that the wrong will be repeated," *Gwaltney*, 484 U.S. at 66, then the citizen suit was not moot, and the district court could impose relief to ensure future compliance. As this Court indicated in *Romero-Barcelo*, the court was entitled to employ civil penalties, rather than an injunction, to deter future violations and ensure continued compliance. See 456 U.S. at 314. It would deny that flexibility and exalt form over substance to require the district court to add a *pro forma* injunction order in order to avoid mootness.

By authorizing citizens to seek civil penalties, Congress intended to provide citizens with an additional means of compelling compliance through the specific deterrent force of a monetary sanction. Cf. *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417 (1975) ("If [violators] faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality."). As this Court recognized in *Gwaltney*, the primary function of the citizen-suit provisions is to compel compliance with the law, 484 U.S. at 59-63, and it is therefore reasonable to conclude that Congress provided for "appropriate civil penalties" (33 U.S.C. 1365(a)) in citizen suits specifically to facilitate that objective. Congress empowered the government to seek civil penalties to punish wrongful conduct as well as to deter future violations, both of which are proper government objectives. *Tull* v. *United States*, 481 U.S. 412, 422-423 (1987). Congress's authorization of civil penalties in citizen suits, however, is properly viewed as limited to the "forward-looking" objective of deterring the defendant from further non-compliance. *Gwaltney*, 484 U.S. at 59. [7]

Civil penalties are an effective "forward-looking" remedy because a coercive monetary sanction allows the court to compel compliance through a mechanism that directly removes the economic incentives that could induce a defendant "to return to his old ways." *City of Mesquite*, 455 U.S. at 289 n.10. The coercive effect of that sanction can be calibrated to respond to the likelihood of future violations. The district court in this case expressly applied civil penalties in that manner for the specific purpose of deterrence. See *Laidlaw II*, 956 F. Supp. at 610-611 (J.A. 181-182). Indeed, the lower courts, which have practical experience with the effectiveness of particular remedies, have concluded that civil penalties are an effective deterrent for Clean Water Act violations. See, *e.g.*, *Natural Resources Defense Council, Inc.* v. *Southwest Marine, Inc.*, 28 F. Supp. 2d 584 (S.D. Cal. 1998); see also *Natural Resources Defense Council, Inc.* v. *Texaco Refining & Marketing, Inc.*, 2 F.3d 493, 503 n.9 (3d Cir. 1993).

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[7] Congress drafted Section 309(d)'s standards for assessing civil penalties (see note 6, *supra*) with deterrence of violations specifically in mind. Section 309(d) makes express reference to setting penalties in light of the "the economic benefit (if any) resulting from the violation." 33 U.S.C. 1319(d). Congress drew that factor, as well as others, from EPA's pre-existing civil penalty policy. See *Tull*, 481 U.S. at 422 n.8. EPA's policy expressly stated that a core objective of civil penalties is to deprive the defendant of the economic benefit of the violation in order to provide effective deterrence. See *EPA Civil Penalty Policy* (1984), *reprinted in Implementation of the Federal Clean Water Act: Hearings on H.R. 81 Before the Subcomm. on Investigations and Oversight of the House Comm. on Public Works and Transp.*, 98th Cong., 2d Sess. 531, 536 (1984).

The civil penalty remedy is also a useful alternative to an injunction because, if the court concludes that an assessment of civil penalties will effectively deter future violations, then the court will not need to engage in the potentially cumbersome role of supervising the defendant's future compliance through an ongoing injunction. In addition, if the defendant knows that it faces the prospect of civil penalties as well as an injunction, it will not have an incentive to engage in "dilatory tactics" to prolong the litigation in the hope of eliminating the need for an injunction and then claiming that the citizen's claim for assessment of the accumulated civil penalties is moot. See *Atlantic States Legal Found., Inc.* v. *Pan Am. Tanning*, 993 F.2d 1017, 1021 (2d Cir. 1993); see also *Comfort Lake Ass'n* v. *Dresel Contracting, Inc.*, 138 F.3d 351, 356 (8th Cir. 1998); *Atlantic States Legal Found., Inc.* v. *Tyson Foods, Inc.*, 897 F.2d 1128, 1137 (11th Cir. 1990). Civil penalties, as an alternative to an injunction, would continue to be available unless it is "*absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur." *Gwaltney*, 484 U.S. at 66.

The court of appeals accordingly erred in inferring from the district court's decision to limit petitioners' relief to civil penalties that petitioners' suit was moot. If this case were truly like *Steel Co.*, and petitioners had brought suit simply to seek imposition of civil penalties for past violations, then they would lack standing, because punishing pre-complaint conduct, discontinued before the suit began, would not redress any cognizable injury to petitioners that could provide the basis for the suit. See 523 U.S. at 106. But this case differs crucially from *Steel Co.* because petitioners brought suit to abate Laidlaw's ongoing environmental violations, Laidlaw was in a state of non-compliance

when the suit was filed, Laidlaw failed to demonstrate that its voluntary cessation had left no reasonable prospect of future violations, and petitioners were therefore entitled to seek a remedy that would adequately ensure future compliance. The civil penalties, which the court expressly levied to deter future violations, were an appropriate judicial means to that end. Cf. *Hewitt* v. *Helms*, 482 U.S. 755, 761 (1987).

Here, unlike the situation in *Steel Co.*, petitioners had more than merely a "generalized interest in deterrence." 523 U.S. at 108. Instead, petitioners had the same Article III interest as one who seeks an injunction or declaratory judgment to curtail "a continuing violation or the imminence of a future violation." *Ibid.* Petitioners sought to deter violations that caused them, and would in the future cause them, injury in fact. See *Hewitt*, 482 U.S. at 761 ("The real value of the judicial pronouncement—what makes it a proper judicial resolution of a 'cause or controversy' rather than an advisory opinion—is in the settling of some dispute *which affects the behavior of the defendant towards the plaintiff*."). The relief the district court awarded—civil penalties calibrated to "provide adequate deterrence under the circumstances of this case" (*Laidlaw II*, 956 F. Supp. at 611 (J.A. 182))—was designed to redress that specific interest by compelling compliance. Petitioners accordingly had the requisite adversarial posture, arising from their concrete interest in abating those violations, to satisfy the requirements of Article III. See *Baker* v. *Carr*, 369 U.S. 186, 204 (1962).[8]

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[8] In its brief in opposition, Laidlaw indicated that it closed the facility after the district court assessed civil penalties. Br. in Opp. 1 n.1. We note that Laidlaw's decision to close the facility after receiving a penalty assessment designed to deter future violations

D. The Court of Appeals' Judgment Should Be Vacated And The Case Remanded For Further Proceedings, Including Appropriate Proceedings Respecting Petitioners' Entitlement To Litigation Costs

For the foregoing reasons, we submit that the court of appeals erred in concluding that the district court's determination not to award injunctive relief rendered this case moot. If the Court agrees, then there will be no occasion to reach the question whether citizens may recover litigation costs if the citizen action becomes moot as a consequence of the defendant's cessation of its unlawful conduct. Under this Court's normal practice, the case will be remanded for resolution of the remaining issues that the court of appeals did not reach, including the question of petitioners' standing.

The question of attorneys' fees can be addressed once the litigation has run its course. We nevertheless observe that there is good reason to question the court of appeals' dictum that "[petitioners'] failure to obtain relief on the merits of their claim precludes any recovery of attorneys' fees or litigation costs because such an award is available only to a 'prevailing or substantially prevailing party.'" Pet. App. 9a n.5. This Court indicated in *Gwaltney* that citizens would be entitled to recover litigation costs for suits that "result in successful abatement but do not reach a verdict." 484 U.S. at 67 n.6 (quoting S. Rep. No. 414, 92 Cong., 2d Sess. 81 (1971)). At the time of that suit, Section 505(d) of the Clean Water Act authorized courts to award

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would not provide a basis for setting aside the civil penalty assessment as moot. Cf. *United States Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 513 U.S. 18, 24-25 (1994) ("The judgment is not unreviewable, but simply unreviewed by [the losing party's] own choice.").

attorneys' fees "whenever the court determines such award is appropriate." 33 U.S.C. 1365(d) (1982). Congress has since revised Section 505(d) to allow an award of litigation costs "to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate." 33 U.S.C. 1365(d). The amendment, which prohibits a court from awarding fees to a losing party, does not appear to restrict the court's power to award fees to a citizen who can show that the suit prompted the defendant to come into compliance.

The Court has previously indicated, in connection with other federal statutes that authorize "prevailing parties" to recover attorneys' fees, that a plaintiff whose suit induces the defendant to comply with the law voluntarily is a "prevailing party." For example, the Court stated in *Hewitt*, *supra*, a case arising under 42 U.S.C. 1983, that "[i]t is settled law, of course, that relief need not be judicially decreed in order to justify a fee award under [42 U.S.C.] 1988." 482 U.S. at 760. The Court explained:

> A lawsuit sometimes produces voluntary action by the defendant that affords the plaintiff all or some of the relief he sought through a judgment—*e.g.*, a monetary settlement or a change in conduct that redresses the plaintiff's grievances. When that occurs, the plaintiff is deemed to have prevailed despite the absence of a formal judgment in his favor.

Id. at 760-761. See also *Maher* v. *Gagne*, 448 U.S. 122, 129 (1980) ("for purposes of the award of counsel fees [under 42 U.S.C. 1988], parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief")

(quoting S. Rep. No. 1011, 94th Cong., 2d Sess. 5 (1976)).

The Court's decision in *Farrar* v. *Hobby*, 506 U.S. 103 (1992), which states that, "to qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim," *id.* at 111, does not repudiate the reasoning in *Hewitt* and *Maher*. A plaintiff prevails on the "merits of his claim" if a court finds that the defendant, in direct response to the plaintiff's suit, has altered his behavior in a way that renders the claim moot as a matter of law. See *Hewitt*, 482 U.S. at 761 ("In all civil litigation, the judicial decree is not the end but the means.").

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded for further proceedings.

Respectfully submitted.

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MAY 1999

Supreme Court, U.S.
FILED
MAY 17 1999
CLERK

No. 98-822

IN THE
Supreme Court of the United States

OCTOBER TERM, 1998

FRIENDS OF THE EARTH, et al.,
Petitioners,

v.

LAIDLAW ENVIRONMENTAL SERVICES (TOC), INC.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

BRIEF FOR PUBLIC CITIZEN AND THE AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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May 14, 1999

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BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF AMICI

Based on its interpretation of this Court's decision in *Steel Co. v Citizens for a Better Environment*, 118 S. Ct. 1003 (1998), the Fourth Circuit dismissed as moot cross appeals in a Clean Water Act citizen suit awarding civil penalties. The Fourth Circuit also held that petitioners could not be awarded attorney's fees, even though petitioners had caused respondent Laidlaw to halt its continuing violations of the Clean Water Act through successful prosecution of the lawsuit.

Because other *amici* with experience in environmental litigation will discuss the merits in detail, this brief primarily addresses the third question on which certiorari was granted: whether defendant may avoid payment of attorney's fees because the case was dismissed for mootness, even though the litigation was, as a factual matter, responsible for bringing the defendant into compliance with the Clean Water Act.[1] As we discuss below, the Fourth Circuit's rule against "catalyst" fee awards is inconsistent with decisions of this Court defining "prevailing party" status, *see Texas State Teacher's Ass'n v. Garland Indep.*

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[1] Counsel for the parties have consented to the filing of this *amicus curiae* brief, and the letters of consent are being filed with the Court simultaneously with the filing of this brief. Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party has authored this brief in whole or in part, and that no person or entity other than Public Citizen and the ACLU has made a monetary contribution to the preparation or submission of this brief.

School Dist., 489 U.S. 782, 792 (1989); *Hewitt v. Helms*, 482 U.S. 755, 761 (1986); *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983); *Maher v. Gagne*, 448 U.S. 122, 129 (1980), as well as the rule in every other circuit.

Public Citizen is a non-profit, consumer advocacy organization with approximately 150,000 members nationwide. Since 1971, Public Citizen has been active in the courts, in Congress, and before regulatory agencies concerning the enforcement of a wide-range of health and safety, environmental, and consumer legislation. Public Citizen has represented plaintiffs in litigation over federal fee-shifting statutes in environmental and other cases. *See Melkonyan v. Sullivan*, 501 U.S. 89 (1991); *Jones v. Brown*, 41 F.3d 634 (Fed. Cir. 1994); *Chesapeake Bay Found. v. United States Dep't of Agric.*, 11 F.3d 211 (D.C. Cir. 1993), *cert. denied*, 513 U.S. 927 (1994); *Dunn v. Florida Bar*, 889 F.2d 1010 (11th Cir. 1989), *cert. denied*, 498 U.S. 811 (1990). In all of these cases, Public Citizen has sought to further the policies behind federal fee-shifting legislation: providing a means for ordinary citizens, who otherwise could not afford counsel, to enforce federal law.

The American Civil Liberties Union is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. In pursuit of those goals, the ACLU maintains an active litigation program in all fifty states and frequently seeks recovery of court-awarded fees. The ACLU therefore has a direct interest in the outcome of this case and a more general concern that the Fourth Circuit's restrictive interpretation of the fee-shifting statutes will hamper enforcement of the civil rights laws contrary to congressional intent. Since its founding in

1920, the ACLU has appeared before this Court on numerous occasions, both as counsel for parties and as *amicus curiae*.

STATEMENT OF THE CASE

This case involves the successful efforts of three citizen groups to force respondent Laidlaw, the operator of a hazardous waste incinerator, to comply with the limits for discharges of specified pollutants in its National Pollutant Discharge Elimination System ("NPDES") permit. The Clean Water Act prohibits the discharge of any pollutant by any person unless the discharge complies with a permit issued pursuant to one of the permit programs established by the Act. Section 402(a) of the Clean Water Act, 33 U.S.C. § 1342(a), provides for the issuance of NPDES permits for the discharge of wastewater. Each permit includes limits on discharge and requires that the permittee monitor and report its compliance with these limits. *Id.*

Before petitioners filed this suit, Laidlaw had violated its permit hundreds of times, discharging mercury, lead, nickel, arsenic, cadmium, chromium, and zinc into the North Tyger River. *Friends of the Earth, Inc., et al., v. Laidlaw Envtl. Servs.*, 956 F. Supp. 588, 593 (D.S.C. 1997). The cause of the discharge violations was an inadequate wastewater treatment system and Laidlaw's failure adequately to control mercury in its operations. *Friends of the Earth, Inc., et al., v. Laidlaw Envtl. Servs.*, 890 F. Supp. 470, 478 (D.S.C. 1995).

The procedural history of the case is set forth in detail in petitioners' brief. For the purposes of this brief, only the following key facts are relevant.

Laidlaw continually violated its permits for a six-year period preceding, and for many months after, petitioners filed this suit in June 1992. 956 F. Supp. at 613-21. During the six-month period prior to the filing of the suit, Laidlaw violated its mercury limits 103 times, including violations as much as 13 times over its permit limit. 890 F. Supp. at 619-21. After petitioners filed suit Laidlaw took steps to install the proper filters and to control the feed rate of mercury-containing waste into its incinerator to abate its illegal discharges. As a result, the number and severity of its mercury violations dropped sharply, although there were still 13 violations after the complaint was filed. 956 F. Supp. at 621.

After numerous pre-trial proceedings, the district court conducted a three-day trial in July and August 1995 on liability and relief. 956 F. Supp. at 592. In January 1997, the district court entered judgment for plaintiffs, assessing a penalty of $405,800 against Laidlaw payable to the U.S. Treasury, and stating that defendant would be responsible for plaintiffs' attorney's fees and costs. *Id.* at 610-11. The district court concluded that, since Laidlaw had by that time achieved substantial compliance with its permit, there was no need for an injunction, but that Laidlaw's penalties and payment of litigation costs would be sufficient to deter Laidlaw from violating its permit in the future. *Id.*

On appeal, the Fourth Circuit remanded with directions to dismiss the case as moot based on this Court's decision in *Steel Company v. Citizens for a Better Environment*, 118 S. Ct. 1003 (1998). *See* 149 F.3d 303, 306-07 (1998). The court of appeals held that, because plaintiffs had not appealed the denial of injunctive relief, and the penalty award could not redress any

injury suffered by plaintiffs, plaintiffs no longer had standing. *Id.* Accordingly, the penalty was vacated. *Id.* In addition, the court of appeals held that it could not award plaintiffs their attorney's fees and costs because Fourth Circuit precedent forbids an award of fees under a "catalyst" theory. *Id.* at 307 n.5.

Thus, plaintiffs were successful in forcing Laidlaw to comply with its Clean Water Act permit after years of violations. Nonetheless, because the claim for injunctive relief was moot, Laidlaw avoided payment of all civil penalties. Moreover, even though plaintiffs performed precisely the role Congress intended citizens to serve under the Clean Water Act, plaintiffs were denied all fees and costs incurred over six years of vigorous and successful litigation, including numerous pre-trial motions, a three-day trial, and appeal.

SUMMARY OF ARGUMENT

Amici submit this brief principally to address the question whether attorney's fees may be awarded where plaintiffs achieve post-complaint compliance without a litigated judgment, consent decree, or formal settlement. Nevertheless, *amici* strongly believe that the Fourth Circuit erred on the merits and, for that reason, they briefly address the merits issues in Part I. In our view, this Court's decision in *Steel Company* does not mandate that an environmental citizen suit be dismissed as moot when, because of post-complaint compliance by the defendant, the only available remedy is civil penalties payable to the United States.

In Part II, we turn to the attorney's fees question. The Fourth Circuit's rule that plaintiffs may not recover attorney's fees under federal fee-shifting statutes, unless they litigate to

final judgment or otherwise obtain an enforceable court order, misreads the language of the statutory fee-shifting statutes and misunderstands this Court's "prevailing party" jurisprudence. The critical issue in determining whether a plaintiff is a "prevailing party" is whether there has been a material alteration of the legal relationship between plaintiff and defendant as a result of the suit, not the particular form that such alteration takes (voluntary compliance, settlement, or litigated judgment). Thus, to receive an award of fees under a "catalyst" theory, plaintiffs must demonstrate that, as a result of their lawsuit, they achieved the objectives of the case through settlement, final judgment, or because the defendant "voluntarily" complied with the law.

The Fourth Circuit stands alone in its view that, under *Farrar v. Hobby*, 506 U.S. 103 (1992), a prevailing party must have achieved success by virtue of "a court's authority" and not by any other means. *See S-1 & S-2 v. State Bd. of Educ.*, 21 F.3d 49, 51 (4th Cir.)(*en banc*), *cert. denied*, 513 U.S. 876 (1994). Every other federal circuit permits recovery of attorney's fees under a "catalyst" theory.[2]

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[2] This Court need only reach the attorney's fees issue if it affirms the Fourth Circuit on the merits. If the Court reverses the Fourth Circuit on the merits, as *amici* believe it should, it may remand for further proceedings without reaching the attorney's fees issue at this time. Nonetheless, since the attorney's fees issue could be at issue in this suit on remand, and since it is an important issue that affects numerous litigants in civil rights and other statutory fee-shifting cases, it would be appropriate for this Court to reach the attorney's fees question even with a remand on the merits to resolve the split in the

(continued...)

ARGUMENT

I. A CITIZEN SUIT IS NOT MOOT WHERE THE ONLY REMAINING REMEDY IS CIVIL PENALTIES AND WHERE CONTINUING VIOLATIONS ARE ALLEGED AND PROVED.

Unlike in *Steel Company v. Citizens for a Better Environment*, 118 S. Ct. 1003 (1998), where the plaintiffs did not, and could not, allege continuing violations at the time they filed their complaint, here petitioners not only alleged, but also proved, continuing violations of the limits in respondent Laidlaw's NPDES permit for mercury discharges. Because Laidlaw appeared to be complying with its permit limits by the time the case reached its remedial phase, the district court declined to issue an injunction in the exercise of its equitable discretion. It did, however, impose substantial civil penalties, in part to deter future violations. The district court also stated that plaintiffs would be entitled to recover their attorney's fees and costs. *See* 33 U.S.C. § 1365(d).

On appeal, the Fourth Circuit's concern about the continuing vitality of the lawsuit once the claim for injunctive relief had been denied should have been analyzed under this Court's decision in *Gwaltney of Smithfield Ltd. v. Chesapeake Bay Foundation*, 484 U.S. 49, 66 (1987). Applying *Gwaltney* and the well-settled principles that it reaffirmed, the Fourth Circuit should have placed a "heavy" burden on respondent Laidlaw to demonstrate that there was "no reasonable expectation" that the violations would recur before dismissing

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[2](...continued)
courts of appeals.

the complaint as moot and vacating the civil penalties. *Id.* (citing *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953)). *See also Steel Co.*, 118 S. Ct. at 1019-20. In fact, no such burden was placed on respondent Laidlaw; for this reason alone the Fourth Circuit's decision should be reversed.

In addition, even though citizen plaintiffs do not have standing to bring an action for penalties where they can neither allege ongoing violations when the complaint is filed nor prove continuing violations at trial, *see Steel Company* and *Gwaltney*, nothing in Article III precludes these plaintiffs from litigating the remedial penalty phase of a case that involved continuing violations at the time of filing, even if there no longer is a claim for an injunction. As explained in greater detail in petitioners' brief and the briefs of the other *amici*, an award of civil penalties and entry of a declaratory judgment redress injuries suffered by these citizen plaintiffs through deterrence of future violations in those cases where plaintiffs have proved post-complaint violations. *See Tull v. United States*, 481 U.S. 412, 422 (1987); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982); *see also Hudson v. United States*, 118 S. Ct. 488, 494 (1997) ("all civil penalties have some deterrent effect").

Thus, in cases in which citizen plaintiffs have alleged (and proved) continuing violations of the defendant's NPDES permit, the interest of those plaintiffs in an award of civil penalties as a deterrent to future violations is enough of an interest to sustain Article III standing through the remedial phase. Otherwise, Congress's intent that citizen suit plaintiffs may recover both civil penalties and injunctive relief will be frustrated. *See* 33 U.S.C. §§ 1319(d), 1365(a). Moreover, even if a citizen plaintiff's interest in an award of civil penalties is a minimal one, which *amici* believe it is not, a minimal interest in deterring future violations through civil penalties is as significant

as the interest in a nominal damages award which this Court has recognized can keep a case alive where an injunctive relief claim is moot. *See Ellis v. Brotherhood of Ry., Airline & S.S. Clerks*, 466 U.S. 435, 442 (1983) ("[A]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot"); *see also University of Texas v. Camenisch*, 451 U.S. 390, 394 (1981).

By comparison, the contrary rule endorsed by the Fourth Circuit would create perverse incentives. If mooting injunctive relief eliminates all relief, plaintiffs will be forced to argue that an injunction is needed and the courts will be required to decide difficult claims for injunctive relief where the real dispute is over an award of civil penalties. Indeed, the United States will be forced to intervene to protect its right to the civil penalties. Defendants, on the other hand, will seek to delay determinations on the merits until they comply and thereby avoid all penalties no matter how significant the violations. *See Natural Resources Defense Council, Inc. v. Texaco Ref. and Mktg., Inc.*, 2 F.3d 493, 503-04 (3d Cir. 1993). On the merits, therefore, *amici* respectfully urge the Court to reverse and adopt the views of five federal circuits that post-complaint compliance does not moot a claim for civil penalties under the Clean Water Act.[3]

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[3] *See Comfort Lake Ass'n, Inc., v. Dresel Contracting, Inc.*, 138 F.3d 351, 356 (8th Cir. 1998); *Atlantic States Legal Found., Inc., v. Stroh Die Casting Co.*, 116 F.3d 814, 820 (7th Cir.), *cert. denied*, 118 S. Ct. 442 (1997); *Natural Resources Defense Council, Inc. v. Texaco Ref. and Mktg,. Inc.*, 2 F.3d 493, 502-03 (3d Cir. 1993); *Atlantic States Legal Found., Inc. v. Pan Am. Tanning Corp.*, 993 F.2d 1017, 1020-21 (2d Cir. 1993); *Atlantic States Legal Found., Inc. v. Tyson Foods, Inc.*,

(continued...)

II. PLAINTIFFS MAY BE "PREVAILING PARTIES" EVEN IF POST-COMPLAINT CESSATION OF ILLEGAL CONDUCT MOOTS THE LITIGATION.

Over 100 federal fee shifting statutes predicate an award of fees on some degree of success by the plaintiffs. *See Marek v. Chesney*, 473 U.S. 1, 43-51 (1985) (appendix listing federal statutes authorizing award of attorney's fees); *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 684 (1983) (Clean Air Act). The fee provision of the Clean Water Act, like many fee-shifting statutes, requires that plaintiffs demonstrate that they are "prevailing" or "substantially prevailing" parties. *See* 42 U.S.C. § 1365(d). The court may award such fees and costs "in issuing any final order." *Id.*

The rationale underlying all of these "citizen suit" and "private attorney general" statutes is essentially the same -- to enable those who have been wronged to seek redress and to encourage the vindication of federal policy by private parties. *See Evans v. Jeff D.*, 475 U.S. 717, 741 (1986) (Section 1988 gives "victims of civil rights violations a powerful weapon that improves their ability to employ counsel, to obtain access to the courts and therefore to vindicate their rights."); *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968) (Title II of 1964 Civil Rights Act). The purpose of the citizen suit provision under the Clean Water Act is to abate violations of the law by both deterring future harm and punishing past, illegal conduct. *See Gwaltney*, 484 U.S. at 61; *see also Pennsylvania, et al., v. Delaware Valley Citizens Council for Clean Air, et al.*,

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[3](...continued)
897 F.2d 1128, 1135-36 (11th Cir. 1990).

478 U.S. 546, 559 (1986). Without the possibility of a fee award after a successful suit, citizens seeking to enforce these statutes will all too often have a difficult time retaining counsel. As a result, these rights will exist in name only -- out of reach to ordinary citizens. *See* H.R. Rep. No. 1558, 94th Cong. 2d Sess. 1-3 (1976) (report accompanying enactment of Section 1988).

Alone among the courts of appeals,[4] the Fourth Circuit interprets the "prevailing party" language and this Court's jurisprudence to preclude recovery under the well-established "catalyst" theory. That catalyst theory recognizes that a party may achieve the objectives of litigation by causing a change in the defendant's behavior even without an enforceable judgment on the merits. The Fourth Circuit's contrary rule, rejecting the catalyst theory, was first announced in *S-1 and S-2*, 21 F.3d at

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[4] *See Comfort Lake Ass'n, Inc. v. Dresel Contracting, Inc.*, 138 F.3d 351, 357-58 (8th Cir. 1998); *Maduka v. Meissner*, 114 F.3d 1240, 1241 (D.C. Cir. 1997); *Marbley v. Bane*, 57 F.3d 224, 233-35 (2d Cir. 1994); *Kilgour v. City of Pasadena*, 53 F.3d 1007, 1010-11 (9th Cir. 1995); *Zinn by Blankenship v. Shalala*, 35 F.3d 273, 274-76 (7th Cir. 1994); *Beard v. Tedska*, 31 F.3d 942, 950-52 (10th Cir. 1994); *Baumgartner v. Harrisburg Housing Authority*, 21 F.3d 541, 546-50 (3d Cir. 1994); *American Council for the Blind of Colorado, Inc. v. Romer*, 992 F.2d 249, 250-51 (10th Cir.), *cert. denied*, 510 U.S. 864 (1993); *Craig v. Gregg County, Texas*, 988 F.2d 18, 20-21 (5th Cir. 1993); *Paris v. United States Dep't of Housing and Urban Development*, 988 F.2d 236, 238 (1st Cir. 1993); *Citizens Against Tax Waste v. Westerville City School*, 985 F.2d 255, 257-58 (6th Cir. 1993); *Pembroke v. Wood County, Texas*, 981 F.2d 225, 231 n.27 (5th Cir.), *cert. denied*, 508 U.S. 973 (1993).

51 (interpreting the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988 ("section 1988")). Later that same year, the "no catalyst" rule was applied to preclude fees in two other section 1988 cases, *Clark v. Sims*, 28 F.3d 420 (4th Cir. 1994), and *Arvinger v. Mayor and City Council of Baltimore*, 31 F.3d 196, 202-03 (4th Cir. 1994). Two years later it was applied to a Voting Rights Act case. *See Statewide Reapportionment Advisory Cmte. v. Beasley*, 99 F.3d 134, 136-37 (4th Cir. 1996). Most recently, it was applied to this case arising under the Clean Water Act. Both in theory and in practice, therefore, the Fourth Circuit's rule dramatically narrows the grounds for fee awards to plaintiffs seeking to vindicate federal civil rights or enforce federal environmental or consumer statutes.

This Court has repeatedly endorsed the catalyst theory of attorney's fee awards, recognizing that a final judgment on the merits is not a necessary prerequisite to achieving "prevailing party" status. For instance, in *Hewitt v. Helms*, 482 U.S. 755 (1987), the Court acknowledged a catalyst theory under Section 1988. "It is settled law, of course, that relief need not be judicially decreed in order to justify a fee award under section 1988." *Id.* at 761. As if to reject the very theory later adopted by the Fourth Circuit, the Court further noted that "[a] lawsuit sometimes produces voluntary action by the defendant that affords the plaintiff all or some of the relief he sought through a judgment -- *e.g.*, a monetary settlement or a change in conduct that redresses the plaintiff's grievances. When that occurs, the plaintiff is deemed to have prevailed despite the absence of a formal judgment in his favor." *Id.* at 760-61. After all, what one seeks in a lawsuit is not a judicial pronouncement for its own sake but to change the behavior of the defendant in some way. *Id.* Thus, "if a defendant, under pressure of the lawsuit, alters his conduct (or threatened conduct) towards the plaintiff that was the basis for the suit, the plaintiff will have prevailed."

Id.

Similarly, in *Maher v. Gagne*, 448 U.S. 122 (1980), the Court stated that "[n]othing in the language of section 1988 conditions the district court's power to award fees on full litigation of the issues or on a judicial determination that the plaintiff's rights have been violated." *Id.* at 129. Rejecting the argument that a settlement -- without a judgment on the merits -- cannot provide "prevailing party" status under section 1988," *Maher* quoted a passage of the Senate Report accompanying the enactment of section 1988. *See id.* "[F]or purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief.") (quoting S. Rep. No. 94-1011, 94th Cong., 2d Sess. 5 (1976)); *see also Hanrahan v. Hampton*, 446 U.S. 754, 756-57 (1979) (per curiam) (recognizing that a person may "in some circumstances be a 'prevailing party' " if his rights are vindicated "without formally obtaining relief"); *cf. Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (prevailing party is one who "succeeds on any significant issue in litigation which achieved some of the benefit the parties sought in bringing suit").

The House Report accompanying Section 1988 explicitly endorses treating cases in which a defendant's "voluntary compliance" affords plaintiffs the requested remedy no differently than cases in which the plaintiffs obtain relief through a favorable judgment on the merits, a settlement, or a consent decree.

> The phrase "prevailing party" is not intended to be limited to the victor only after entry of a final judgment following a full trial on the merits . . . . If the litigation is terminated by consent decree, for

> example, it would be proper to award counsel fees [citations omitted]. A "prevailing party" should not be penalized for seeking an out-of-court settlement, thus helping to lessen docket congestion. Similarly, after a complaint is filed a defendant might voluntarily cease the unlawful practice. A court should still award fees even though it might conclude, as a matter of equity, that no formal relief, such as an injunction, is needed.

H.R. Rep. No 1558, 94th Cong., 2d Sess. 7 (1976). The legislative materials accompanying the 1987 amendments to the Clean Water Act similarly support the view that a "prevailing party" is one who settles the case as surely as one who litigates to judgment. *See* S. Rep. No. 50, 99th Cong., 1st Sess 33 (1985) ("The Committee recognizes that a party may 'prevail' by achieving a successful settlement."); *see also* S. Rep. No. 233, 98th Cong., 1st Ses 24-25 (1983).

In the Fourth Circuit's view, however, this Court's endorsement of the catalyst theory over the course of a decade was overruled *sub silentio* by this Court's decision in *Farrar v. Hobby*, 506 U.S. 103 (1992). No other circuit has adopted that interpretation of *Farrar* and for very good reason: The Court in *Farrar* did not consider or rule on the validity of the catalyst theory. Rather, the issue in *Farrar* was whether a fee award of $280,000 was reasonable, assuming the plaintiff had technically prevailed through an award of $1 in a suit seeking $17 million. In the course of a general discussion on fee awards under Section 1988, the Court stated that, to be a prevailing party, a "plaintiff must obtain at least some relief on the merits of his claim," an "enforceable judgment against the defendant," or "comparable relief through a consent decree or settlement." *Id.* at 111. Citing to the test articulated in *Texas State Teachers*

Ass'n v. Garland Indep. Sch. Dist., 489 U.S. 782, 792 (1989), the Court explained that a "plaintiff prevails when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." 506 U.S. at 111.

The Fourth Circuit incorrectly construed the comments in *Farrar* about obtaining relief through an enforceable judgment, consent decree, or settlement as an exhaustive list, foreclosing the possibility of a fee award where the plaintiff achieves relief through "voluntary" compliance by the defendant. Writing for a one-vote *en banc* majority in *S-1 and S-2*, the court held that a "prevailing party" must achieve success by virtue of "a court's authority," and not by any other means. 21 F.3d at 51. Nothing in *Farrar*'s holding suggests that prevailing party status may not be achieved in other ways. In fact, the context makes clear that the list in *Farrar* is not exclusive and that the core inquiry remains the one articulated in *Texas State Teachers, Maher, Hewitt,* and *Hensley* -- alteration of the relationship between a plaintiff and a defendant in a way that benefits the plaintiff. 506 U.S. at 111. As the Third Circuit has noted, "it is not likely that the Supreme Court would overturn such a widespread theory without even once mentioning it, particularly when it was inapplicable to the case at hand." *Baumgartner v. Harrisburg Hous. Auth.*, 21 F.3d 541, 546-50 (3d Cir. 1994); *accord Zinn by Blankenship v. Shalala*, 35 F.3d 273, 274-76 (7th Cir. 1994).

The language in *Texas State Teachers* and *Farrar* that a prevailing party must demonstrate a "material alteration of the legal relationship" was meant to clarify that mere technical victories might be too insignificant to meet the prevailing party threshold. *See* 489 U.S. at 792-93. Once the defendant's behavior has changed to moot the factual basis of the complaint,

the legal relationship has likewise been altered because the defendant can no longer be said to be in violation of legal rights held by the plaintiff. This language cannot be fairly read to require, contrary to the explicit views of the Court in *Maher* and *Hewitt*, that there be an enforceable judgment before a litigant may be a "prevailing party."

To the contrary, *Texas State Teachers* and *Farrar* reaffirmed the by then well-established jurisprudence that the threshold test for prevailing party status is whether the plaintiff "succeed[ed] on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Farrar*, 506 U.S. at 109 (citing *Hensley*, 461 U.S. at 433); *Texas State Teachers*, 489 U.S. at 789 (citing *Hensley*, 461 U.S. at 433). As Justice O'Connor's concurrence in *Farrar* made clear, the inquiry remains one of causation: whether the plaintiffs succeeded, through the vehicle of the lawsuit, in achieving at least some of the practical relief that they sought by changing the "behavior of the defendant towards the plaintiffs." *See Farrar*, 506 U.S. at 116 (O'Connor, J. *concurring*) (citing *Hewitt*, 482 U.S. at 761). Once the conditions of causation and substantial benefit to the plaintiff are satisfied, there is no need for the additional requirement that the change in conduct or law be judicially mandated or formalized by judicial decree. *See, e.g., Marbley v. Bane*, 57 F.3d at 234; *Baumgartner*, 21 F.3d at 547; *see also Nadeau v. Helgemoe*, 581 F.2d 275 (1st Cir. 1978).

In some cases, like *Texas State Teachers* and *Farrar*, success in the litigation will take the form of a judgment in plaintiffs' favor. *See also Rhodes v. Stewart*, 488 U.S. 1, 4 (1988) (party who wins a declaratory judgment prevails if judgment affects "behavior of the defendant toward the plaintiff"). But even if there is no such legal judgment to

enforce, a change in defendant's behavior that has the practical effect of redressing plaintiff's alleged injuries, and the legal effect of mooting out their complaint, means that plaintiffs have "prevailed" as surely as obtaining a declaratory judgment or securing nominal relief. *See Maher*, 448 U.S. at 129. In this case, the alteration in defendant's conduct actually conferred a greater benefit on plaintiffs who otherwise could not catch or eat fish from the North Tyger River because of mercury contamination, than in a case like *Farrar* where plaintiff obtained only nominal relief that, nonetheless, was embodied in a court judgment. In sum, the decision in *Farrar* does not foreclose a catalyst theory of fee recovery and the Fourth Circuit erred in so holding contrary to the language, history, and purpose of the fee-shifting statutes. [5]

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[5] The court of appeals acknowledged that its decision on fees was inconsistent with the decision in *Gwaltney*. *See* 149 F.3d at 307 n.5. Nonetheless, in addition to its reliance on *Farrar*, the court of appeals suggested that the 1987 amendment to the Clean Water Act adding the "prevailing party" language, accounted for the difference. The pre-amendment language had provided that fees might be awarded "whenever the court determines such award is appropriate." *Gwaltney*, 484 U.S. at 67 n.6. Congress amended this language solely to eliminate confusion over whether fee awards could be made to plaintiffs who had not prevailed at all, *see Ruckelshaus*, 463 U.S. at 682, and to clarify that at least some degree of success in the litigation must be achieved, as had been the standard in civil rights case under 42 U.S.C. § 1988. *See A Legislative History of the Water Quality Act of 1987*, 100th Cong., 2d Sess. Sen. Print 144 (Nov. 1988), vol. 2, pp. 1311-1312.

Indeed, a case such as this one, in which relief on the merits has arguably become moot because of post-complaint compliance by the defendant, provides the classic situation in which an award under a catalyst theory is appropriate. *See Zinn by Blankenship*, 35 F.3d at 274 ("a plaintiff may be a prevailing party for purposes of section 1988 even if the defendant voluntarily provides the relief sought rather than litigating the suit to judgment"); *Little Rock School Dist.v. Pulaski County Special School Dist. #1*, 17 F.3d 260, 262 (8th Cir. 1994) ("[w]here a defendant voluntarily complies with a plaintiff's requested relief, thereby rendering the plaintiff's lawsuit moot, the plaintiff is a 'prevailing party' under section 1988 if his suit is a catalyst for the defendant's voluntary compliance and the defendant's compliance was not gratuitous"); *Jean v. Nelson*, 863 F.2d 759, 766 (11th Cir.), *aff'd*, 496 U.S. 154 (1988) ("mooting of a lawsuit by a defendant's favorable remedial action does not necessarily deprive a plaintiff of 'prevailing party' status"); *see also Watkins v. Fordice*, 7 F.3d 453, 456 (5th Cir. 1993). Otherwise, "if defendants could deprive plaintiffs of attorneys' fees by unilaterally mooting the underlying case by conceding to plaintiffs' demands, attorneys might be more hesitant about bringing ... these civil rights suits, a result inconsistent with Congress's intent in enacting section 1988." *Baumgartner*, 21 F.3d at 548; *accord Zinn*, 35 F.3d at 274-76.

Under the Fourth Circuit's prohibition on catalyst fee awards, however, plaintiffs are deprived of any award of attorney's fees despite their success in vindicating federal rights. If the Fourth Circuit's rule precluding catalyst fee awards is allowed to stand, it will virtually assure that fewer citizen suits -- under both the civil rights statutes and the environmental statutes -- will be brought. Combined with the Fourth Circuit's holding on the merits that a defendant may avoid an assessment

of civil penalties by dragging out the case until it brings itself into compliance, and the enormous expense involved in litigating these cases to a successful resolution, citizen groups will not be able to find attorneys with the financial resources to bring these cases. Such a result is contrary to Congress's intent to provide a means for ordinary citizens harmed by violations of federal civil rights, environmental, and other statutes to serve as adjuncts to law enforcement by state and federal officials.

CONCLUSION

For the reasons given, this Court should reverse and remand the Fourth Circuit's decision on the merits. In that case, this Court need not reach the attorney's fees issue. However, if this Court affirms on the merits, the attorney's fees issue will be squarely presented and this Court should reverse the Fourth Circuit's "no catalyst" rule. In any event, *amici* believe that this Court may reach the attorney's fees issue, to give guidance both in this case on remand and to the lower courts more generally.

Respectfully submitted,

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May 14, 1999

No. 98-822

Supreme Court, U.S.
FILED
MAY 17 1999
CLERK

In The

Supreme Court of the United States

FRIENDS OF THE EARTH, *et al.*,

Petitioners,

v.

LAIDLAW ENVIRONMENTAL SERVICES (TOC), INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

AMICUS BRIEF OF NATURAL RESOURCES DEFENSE COUNCIL, INC., CLEAN WATER ACTION, INC., AMERICAN LITTORAL SOCIETY, DELAWARE RIVERKEEPER NETWORK, CITIZENS FOR A BETTER ENVIRONMENT, DELTA KEEPER, A PROJECT OF THE SAN FRANCISCO BAYKEEPER, CALIFORNIA PUBLIC INTEREST RESEARCH GROUP, FLORIDA PUBLIC INTEREST RESEARCH GROUP, ILLINOIS PUBLIC INTEREST RESEARCH GROUP, MASSACHUSETTS PUBLIC INTEREST RESEARCH GROUP, PUBLIC INTEREST RESEARCH GROUP IN MICHIGAN, PUBLIC INTEREST RESEARCH GROUP OF NEW JERSEY, OHIO PUBLIC INTEREST RESEARCH GROUP, OREGON STATE PUBLIC INTEREST RESEARCH GROUP, WASHINGTON PUBLIC INTEREST RESEARCH GROUP, CHESAPEAKE BAY FOUNDATION, INC., AMERICAN CANOE ASSOCIATION, INC., NEUSE RIVER FOUNDATION, PENNSYLVANIA ENERGY PROJECT, SAN DIEGO BAYKEEPER, FOREST GUARDIANS AND DON'T WASTE ARIZONA IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI*

Amici are not-for-profit public interest organizations working to protect the environment and the public health.[1] *Amici's* work includes influencing environmental and public health legislation, persuading policy makers to provide greater environmental and public health protection, and conducting research into environmental and public health problems. *Amici* agree, however, that in the end "enforcement of the law is what really counts." *Evans v. Jeff D.*, 475 U.S. 717, 743 (1986) (Brennan, J., dissenting). Accordingly, *amici* regularly employ the citizen suit provisions of environmental laws, such as the Clean Water Act, to enforce those laws. This interest of *amici* is threatened by the Fourth Circuit's decision in this case.

INTRODUCTION

I. THE IMPORTANCE OF COMPLIANCE AND DETERRENCE UNDER THE CLEAN WATER ACT.

The Water Pollution Control Act Amendments of 1972 (commonly referred to as the "Clean Water Act") fundamentally changed the nation's approach to water pollution. The Clean Water Act prohibits any point source discharge to the surface waters of the United States unless that discharge is "in compliance" with various requirements of the Act. 33 U.S.C. § 1311(a). These requirements are applied to individual dischargers through the National Pollutant Discharge Elimination

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[1] Counsel for the parties have consented to the filing of this *amicus curiae* brief, and the letters of consent are being filed with this brief. Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party has authored this brief in whole or in part, and that no person or entity other than *amici* has made a monetary contribution to the preparation or submission of this brief.

System ("NPDES") program, the central feature of which is the issuance of individual NPDES discharge permits. *See* 33 U.S.C. § 1342.[2] This "discharge elimination" program, in turn, was designed to further the Act's "national goal" that "the discharge of pollutants into the navigable waters be eliminated." 33 U.S.C. § 1251(a)(1).

Congress believed that strong enforcement measures would be necessary to change the behavior of dischargers and make the goals of the Act a reality. *See, e.g.*, Statement of Sen. Bayh (Oct. 4, 1972) *reprinted in 1 A Legislative History of the Water Pollution Control Act Amendments of 1972* (1973) at 216 ("without strict enforcement and meaningful deterrents, water pollution control laws will have no real effect."). Accordingly, Congress authorized the United States Environmental Protection Agency ("EPA"), and, in certain circumstances, citizens, to seek civil penalties and injunctive relief against violators of the Act. The result is an enforcement system designed to bring those who are out of compliance into compliance, and to deter future violations.[3] The availability of civil penalties is central to this enforcement scheme.

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[2] NPDES permits are issued by the United States Environmental Protection Agency or, where the state in which the discharge occurs is operating a Clean Water Act program that meets federal criteria and has been approved by EPA, by the state.

[3] The 1972 Act authorized court-imposed civil penalties of $10,000 per day per violation. In 1987, Congress increased the maximum civil penalty to $25,000 per day per violation, *see* 33 U.S.C. § 1319(d), and authorized EPA to impose administrative penalties. *Id.* § 1319(g). *See* 133 Cong. Rec. H175 (daily ed. Jan. 8, 1987) (statement of Rep. Nowak) (increased penalty focus was designed to "reduce violations of the Act and discourage those parties who would choose to violate the Act with little fear of punishment.")

II. THE ROLE OF CITIZEN SUITS IN ENFORCING THE ACT.

In the "citizen suit" provision of the Clean Water Act, Congress gave persons affected by violations of the Act a private right of action "to enforce" the Act against violators. 33 U.S.C. § 1365(a). As the language and legislative history of the Act make clear, Congress intended citizen suits to be an essential component of the Act's enforcement scheme. *See* 33 U.S.C. § 1251(e) ("Public participation in the development, revision, and *enforcement* of any regulation, standard [or] effluent limitation . . . shall be provided for, encouraged, and assisted by the Administrator [of EPA] and the States.") (emphasis added). Congress provided for citizen suits because it recognized that EPA and the states would not always have the resources, or the political will, to enforce the Act as Congress intended. Thus, while the federal and state governments have primary enforcement authority,[4] citizen suits are an essential component of an enforcement scheme that emphasizes compliance and deterrence.

Congress included certain "gatekeeper" provisions in the Clean Water Act to minimize conflicts between citizen enforcement and agency enforcement. The Act requires that, prior to filing suit, citizens give sixty days' notice of the alleged violation to the violator, EPA, and the state. *See* 33 U.S.C. § 1365(b)(1)(A). If EPA or the state wishes to wholly preclude a citizen suit, it may file and "diligently"

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[4] As between the two, the overriding authority rests with the federal government. The Clean Water Act created a federal program designed to serve a set of clearly articulated federal interests. *See, e.g., EPA v. State Water Resources Control Board*, 426 U.S. 200, 206-208 (1976) (explaining federal primacy in Clean Water Act implementation).

prosecute its own judicial enforcement action[5] after receiving the citizen's notice of suit. *See id.* § 1365(b)(1)(B).[6] Unless EPA or the state does so, however, or unless the violator takes all corrective action

[5] In discussing the degree of "diligence" required, the Senate Report noted that "if the court viewed the agency action as inadequate, it would have jurisdiction to consider the citizen action notwithstanding any pending agency action." S. Rep. No. 92-414, 92nd Congress, 2d Session, p. 80 (1971), *reprinted in 1972 U.S. Code Cong. and Admin. News* 3668, 3746. After a lengthy factual hearing, at which several witnesses testified, the district court in this case concluded that a state court consent decree negotiated between Laidlaw and the State of South Carolina did not constitute "diligent" prosecution. *See Friends of the Earth v. Laidlaw Environmental Services*, 890 F. Supp. 470, 478-480, 484, 489, 493 (D. S.C. 1995) (identifying at least twelve separate factors indicating lack of diligence in the state's enforcement proceeding).

[6] Agency administrative action also precludes a citizen penalty action, but only when the agency's action was begun prior to service of the citizen's sixty day notice and diligently seeks (or has imposed) an administrative penalty for the same violations under 33 U.S.C. § 1319(g), or under a comparable state law. *Id.* at § 1319(g)(6)(A) & (B). An administrative penalty action does not, however, bar a citizen action for injunctive relief where the discharger remains in violation. *See id.* § 1319(g)(a) (only "a civil penalty action" brought by the United States or a citizen is barred). It is evident that Congress was aware of the interplay it was creating between agency actions and citizen suits. *E.g.*, S. Rep. No. 99-50 at 28 (1985) ("This amendment . . . strikes a balance between two competing concerns: The need to avoid placing obstacles in the path of such citizen suits and the desire to avoid subjecting violators of the law to dual enforcement actions or penalties for the same violation"). After explaining that the "balance" chosen was the middle ground of Section 1319(g)(6)(A), the Senate Report then notes that an agency "can prevent duplicate proceedings by . . . bringing its own judicial action before a citizen suit is filed." *Id.*

necessary to ensure sustained compliance with the Act, *see Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987) (citizens may not bring suit if violations are not "ongoing" at the time of the filing of the complaint), the citizen may file suit after the expiration of the notice period.

Congress thus drew a bright line between the time prior to the filing of the citizen suit and the time following the filing of suit. Where the regulatory agencies and the violator fail to address violations adequately prior to the filing of the citizen suit, citizens are authorized to bring suit to enforce the Act, and to seek both injunctive relief and civil penalties.[7]

SUMMARY OF ARGUMENT

The Fourth Circuit in this case erred in two respects. First, the Fourth Circuit erred in holding that there is no longer an Article III case or controversy here. The Fourth Circuit was incorrect in concluding that the plaintiffs' injuries could not be redressed by the deterrent effect of imposing civil penalties on Laidlaw, and in relying on *Steel Company v. Citizens for a Better Environment*, 523 U.S. ___, 118 S. Ct. 1003 (1998), to arrive at that conclusion.

[7] This answers the concern, expressed by South Carolina business *amici* in their opposition to *certiorari*, that citizen suits "might ultimately discourage out of court settlements between agencies and regulated entities." Brief of *Amici Curiae* South Carolina Chamber of Commerce, *et al.*, on Petition for Writ of Certiorari, p. 13. The congressional goal in crafting the Act's enforcement provisions clearly was compliance and deterrence, and not settlement *per se*. So long as agencies and violators enter into enforcement agreements that meet these goals, violators will be free of subsequent citizen enforcement for the same violations.

In *Steel Company*, the plaintiffs did not allege ongoing harm, and there thus was nothing for civil penalties to deter. In the case at bar, however, the plaintiffs alleged and proved ongoing violations of the Clean Water Act. This Court specifically noted in *Steel Company* that, where there are allegations of future violations, judicial relief aimed at deterring those violations satisfies the redressability requirement of Article III. 118 S. Ct. at 1019. Congress recognized in the Clean Water Act that when ongoing violations are proven, civil penalties specifically deter future violations, and such deterrence benefits citizen plaintiffs. That Congressional finding is consistent with common sense, an extensive body of empirical literature, and this Court's prior opinions. That finding is also entitled to deference.

Even if Congress had not determined that penalties must be imposed on Clean Water Act defendants to deter their future misconduct, violators who come into compliance with the Act after being sued would bear a heavy burden in attempting to establish that they will not violate in the future (and thus that there is no need for deterrence). Laidlaw did not meet that heavy burden here.

Second, even if the case is moot, the Fourth Circuit erred by refusing to consider whether, for purposes of an application for fees and costs, this citizen suit was a "catalyst" in bringing this defendant into compliance with the Clean Water Act. This Court has consistently held that claims for fees and costs survive the conclusion of the merits phase of litigation, whether the merits are resolved through a final judgment, a settlement, or a mooting of the case through the actions of a defendant.

The Fourth Circuit reached its conclusion with regard to fees by drawing an incorrect inference from the 1987

amendments to the Clean Water Act citizen suit provision. Congress in 1987 clarified that Clean Water Act plaintiffs who lose their cases cannot receive fees, but Congress at the same time reaffirmed that plaintiffs who achieve even partial success are entitled to fees. Congress was aware of this Court's "catalyst" jurisprudence when it amended the citizen suit provision, and Congress chose language in amending that provision that logically incorporates the catalyst test.

If the Fourth Circuit's opinion were allowed to stand, defendants would be encouraged to defend against meritorious citizen suits, and comply with the Clean Water Act only when it appears that a final judgment is imminent. Under the Fourth Circuit's reasoning, such defendants would thus avoid paying a penalty for their violations. Citizens would be far less likely to bring actions to enforce the Clean Water Act, or to enforce any other legislation where Congress has authorized citizens to seek civil penalties and recover fees when successful. Because citizen enforcement is central to the goals of the Clean Water Act, such an outcome would frustrate not only Congress's specific authorization of citizen enforcement, but also its overriding goal of improving the quality of the nation's waters.

ARGUMENT

I. THE IMPOSITION OF CIVIL PENALTIES REDRESSES A CITIZEN PLAINTIFF'S INJURY BY DETERRING FUTURE VIOLATIONS.

In Clean Water Act citizen suits, the plaintiff typically satisfies the case or controversy requirement of Article III by demonstrating that he or she is being injured by

violations of the Act, and that this injury will be lessened by relief designed to deter such violations in the future.[8]

In the case at bar, the plaintiffs are injured because, although they would like to catch and eat fish from the North Tyger River, they refrain from doing so due to the risks associated with being exposed to mercury discharged by Laidlaw into the river. Further, the evidence in the case shows that fish from the river contain mercury, and that the plaintiffs' concern is reasonable. *Friends of the Earth v. Laidlaw Environmental Services (TOC)*, 956 F. Supp. 588, 601 (D. S.C. 1997). It is commonly known that the ingestion of mercury can be hazardous; as the district court found in this case, "[m]ercury is an extremely toxic pollutant." *Id.* at 601.[9]

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[8] A party has Article III standing to bring suit in federal court when: (1) that party "personally suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant" (often referred to as "injury-in-fact"); (2) the injury "fairly can be traced to the challenged action;" and (3) the injury "is likely to be redressed by a favorable decision." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982) (citations omitted).

[9] As this case demonstrates, persons using a waterway can be adversely affected by violations of the Act, and thus "injured" for Article III purposes, before pollution levels increase so much that plants or animals start dying or public health warnings are posted. Abatement of pollution for the purpose of preventing the despoliation of a waterway is an express goal of the Clean Water Act, and one in which citizens have a concrete interest. As discussed *supra*, Part I, Congress determined in the Clean Water Act that it is the "national policy" that there should be *zero* (as opposed to environmentally benign) discharges of pollutants into the nation's waters. 33 U.S.C. §§ 1251(a)(1) and (6). Moreover, it is the effect of the illegal mercury discharges on the plaintiffs, not the effect on the river, that is the focus of the Article III inquiry. Reasonable

The plaintiffs' injury can be traced to Laidlaw's violations of the Act. To the extent that Laidlaw complies with its NPDES permit limit for mercury, less mercury is present in the river, less mercury gets into the fish that swim in the river, and the plaintiffs' concerns about mercury exposure are reduced. The relief sought by the plaintiffs will redress their injuries, because the imposition of a civil penalty on Laidlaw will deter future violations, and reduce the likelihood that mercury will be illegally discharged to the river.

The Fourth Circuit, however, read this Court's opinion in *Steel Company v. Citizens for a Better Environment*, 523 U.S. ___, 118 S. Ct. 1003 (1998), as prohibiting federal courts from considering the deterrent effect of penalties when determining whether there is an Article III case or controversy in citizen suits to enforce the Clean Water Act:

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people could decide that they want to ingest or be exposed to as little mercury as possible – even below levels determined by regulatory agencies to pose no known health risk to humans. Indeed, people make this kind of decision all the time: people use water filters in homes where city tap water has been declared safe, and people buy organically grown fruits and vegetables to avoid pesticides even though the government has set health standards governing the amount of pesticides permitted on conventionally grown fruits and vegetables. *See Duke Power Co. v. Env'tl Study Grp., Inc*, 438 U.S. 59, 74 (1977) (concern about exposure to radiation from licensed nuclear power plant sufficient injury-in-fact "given our generalized concern about exposure to radiation and the apprehension flowing from the uncertainty about the health and genetic consequences of even small emissions like those concededly emitted by nuclear power plants.")

> Prior to *Steel Co.* . . . this court had held that because 'penalties can be an important deterren[t] against future violations,' they could redress a private plaintiff's injury from the violations even though the penalties are not paid to the plaintiff . . . Because *Steel Co.* represents 'a superseding contrary opinion of the Supreme Court,' we are required to follow it.

Friends of the Earth v. Laidlaw Environmental Services (TOC), Inc., 149 F.3d 303, 306 (4th Cir. 1998) (citations omitted). This misreads *Steel Company*, and puts the Fourth Circuit's opinion squarely at odds with this Court's jurisprudence on the deterrent effect of penalties.

In *Steel Company*, there was no allegation of future violations, and thus nothing to deter. *Id.* at 1019. As this Court noted in that case, however, where a citizen plaintiff alleges harm from "a continuing violation or the imminence of a future violation," judicial relief designed to deter future violations will "remedy that alleged harm." *Id.* at 1019. That is precisely the situation here, and precisely the role that Congress envisioned for civil penalties under the Clean Water Act. As this Court has noted, civil penalties serve as "a means of ensuring compliance" with the Clean Water Act. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 314 (1982) ("An injunction is not the only means of ensuring compliance. The [Clean Water Act] . . . provides for fines and criminal penalties.").

The plaintiffs in this case alleged and proved continuing harm, and sought both a civil penalty and injunctive relief in an effort to ensure that Laidlaw would not violate in the future. After trial, the district court determined that an injunction was not necessary, and that the imposition of a civil penalty would "provide adequate deterrence under the circumstances of this case." *Friends of the Earth v. Laidlaw Environmental Services (TOC)*, 956 F. Supp. at 611. It is this specific deterrence of Laidlaw's

propensity to violate in the future that redresses the plaintiffs' injury in this case.

A. Congress Has Determined That The Imposition Of Civil Penalties On Violators Of The Clean Water Act Deters Them From Violating The Act In The Future.

The Clean Water Act specifies that, when a violation of the Act is established in a court proceeding, the violator "*shall* be subject to a civil penalty not to exceed $25,000 per day for each violation." 33 U.S.C. § 1319(d) (emphasis added). As the Fourth Circuit itself has recognized, see *Stoddard v. Western Carolina Regional Sewer Authority*, 784 F.2d 1200, 1208 (4th Cir. 1986), this is a mandate to the district courts to impose a penalty on violators of the Act. *Accord, Atlantic States Legal Found., Inc. v. Pan American Tanning Corp.*, 993 F.2d 1017, 1021 (2d Cir. 1993); *Atlantic States Legal Found., Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1140-42 (11th Cir. 1990).[10]

Among the factors that Congress directed the district courts to consider in calculating the amount of the penalty are "the economic benefit (if any) resulting from the violation," and "the economic impact of the penalty on the violator." 33 U.S.C. § 1319(d). This indicates that Congress intended the penalty to create an economic incentive for the violator to refrain from violating the Act in the future. *See Tull v. United States*, 481 U.S. 412, 422-23 (1987) (Clean Water Act's legislative history "reveals that Congress wanted the district court to consider the need

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[10] In contrast, the decision as to whether to impose *administrative* penalties under section 1319(g) of the Act is left to the discretion of EPA. *See* 33 U.S.C. § 1319(g) (" . . . the Administrator . . . *may*, after consultation with the State in which the violation occurs, assess a . . . civil penalty . . . under this subsection") (emphasis added).

for retribution and deterrence, in addition to restitution, when it imposed civil penalties," and the district court may "seek to deter future violations by basing the penalty on its economic impact.")[11] By directing that courts consider the economic impact on the specific violator being prosecuted, Congress indicated that it expected penalties to deter that violator specifically.

The congressional determination that penalties are needed to deter future violations is entitled to considerable weight. As a general matter, the factual (and policy) determinations of Congress are given substantial deference by this Court. *See, e.g., Hodel v. Virginia Surface Mining & Recl. Ass'n*, 452 U.S. 264, 276 (1981). Moreover, as this Court has specifically recognized, the factors influencing the choice of which remedy or remedies will most effectively solve "the . . . problem of deterrence" are "matters within legislative competence." *Tigner v. State of Texas*, 310 U.S. 141, 149 (1940).

Congress's determination as to the deterrent value of penalties under the Clean Water Act also has important Article III implications. As noted in *Havens Realty Co. v.*

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[11] The enumerated factors to be considered in setting the amount of the penalty were added as part of the 1987 amendments. As noted in the Senate Report on the 1987 amendments, Congress believed that disgorging the economic benefit earned as a result of noncompliance is an important factor in reducing the economic incentive to violate in the future. *See* S. Rep. No. 99-50, at 25 (1985) ("Violators should not be able to obtain an economic advantage vis-à-vis their competitors due to their noncompliance with environmental laws."). *See also Tyson Foods*, 897 F.2d at 1141 ("Insuring that violators do not reap economic benefit by failing to comply with the statutory mandate is of key importance if the penalties are successfully to deter violators.").

Coleman, 455 U.S. 363, 373 (1982), "congressional intention cannot be overlooked" in determining whether the pursuit of a judicial remedy afforded by statute constitutes a case or controversy under Article III. *See also Lujan v. Defenders of Wildlife*, 504 U.S. 505, 580 (1992) ("Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.") (Kennedy, J. and Souter, J., concurring).

Here, Congress has expressed its intent that violators of the Clean Water Act "shall be subject to a civil penalty," 33 U.S.C. § 1319(d), because Congress believed that this remedy would create an economic deterrent to future violations. Since the deterrence of future violations will redress the injury of citizen plaintiffs who seek to avoid the adverse effects of such violations, Article III is satisfied.

B. There Is Ample Evidence That Penalties Do In Fact Deter Future Violations.

The deterrent effect of monetary sanctions has long been recognized, *e.g.*, Richard A. Posner, ANTITRUST LAW, AN ECONOMIC PERSPECTIVE, at 221 (1976) (statutory treble damages in antitrust litigation perform a deterrence function against violators of the law), and the economic theory of deterrence is well-developed. *See, e.g.*, Richard A. Posner, ECONOMIC ANALYSIS OF THE LAW, at 265 (4th Ed. 1992) ("[T]he primary function of law, in an economic perspective, is to alter incentives."); George J. Stigler, *The Optimum Enforcement of Laws*, 78 J. POL. ECON. 526 (1970). In general, "[d]eterrence is a function of the expected punishment, which is a product of both the perceived probability and severity of punishment." Michael J. Metzger, *Treble Damages, Deterrence, and Their Relation to*

Substantive Law: Ramifications of the Insider Trading Sanctions Act of 1984, 20 VAL. U. L. REV. 575, 595 (1986).

As an empirical matter, and as a matter of common sense, penalties *do* deter future misconduct. A recent study of enforcement actions taken by the Occupational Safety and Health Administration ("OSHA"), for example, found

> a significant negative relationship between OSHA inspections that impose a penalty and the change in injuries at the penalized plant over subsequent years. In our analysis, an inspection imposing a penalty reduces injuries by 22% over a three-year period, and reduces lost workdays by 20%. This relationship holds even after testing and controlling for potential biases.

Wayne B. Gray & John T. Scholz, *Does Regulatory Enforcement Work? A Panel Analysis of OSHA Enforcement*, 27 LAW & SOC'Y REV. 177, 199 (1993).[12]

Not surprisingly, this Court has acknowledged the specific deterrent effect of penalties on those who are penalized. *See, e.g., Bennett v. Spear*, 520 U.S. 154, 170 (1997) (finding redressability in Endangered Species Act case because of likelihood that threat of "substantial civil and criminal penalties" will motivate behavior related to the plaintiffs' injuries); *United States Dept. of Energy v. State of Ohio*, 503 U.S. 617, 625 (1992) (noting that where a Clean Water Act defendant is exempt from penalties, it "may break the law where it might have complied voluntarily if it had faced the prospect of punitive fines for past violations."); *Weinberger v. Romero-Barcelo*, 456 U.S. at 314 (identifying civil penalties as a "means of ensuring compliance" with the Clean Water Act).

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[12] The authors of the study found that it was the penalty, and not merely the inspection, that made the difference. *See id.* at 192.

Lower courts have consistently found that civil penalties have a deterrent effect on the Clean Water Act violators on whom they are imposed. Indeed, as discussed *supra*, the Fourth Circuit itself acknowledged in this case that " 'penalties can be an important deterren[t] against future violations.' " *Laidlaw*, 149 F.3d at 306 n.4, *quoting Sierra Club v. Simkins Indus., Inc.*, 847 F.2d 1109, 1113 (4th Cir. 1988). *See also Public Interest Research Group of New Jersey v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 73 (3d Cir. 1990) (finding Article III redressability because "[p]enalties will deter . . . [the defendant] specifically.").

Courts often decline to issue an injunction precisely because they believe that penalties alone will provide sufficient deterrence. Moreover, the *punitive* nature of penalties is more clearly focused on providing deterrence than is a simple order to comply. *See, e.g., Albermarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975) ("If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality;" it is the "reasonably certain prospect" of a monetary penalty that "provides the spur or catalyst" for compliance); *Reich v. Occupational Safety and Health Review Comm'n*, 102 F.3d 1200, 1203 (11th Cir. 1997) ("As long as a business operates, it should feel itself to be effectively under the applicable laws and regulations – even on the last day. And the continuing potential of penalties – more so than injunctive relief – makes these feelings real."). *See also* S. Rep. No. 99-50, at 29 (1985) (Congress added administrative penalties to the Clean Water Act because "issuance of an administrative [compliance] order, without penalties, has not proven powerful enough to motivate violators . . . ").

C. Deterring A Defendant's Propensity To Violate The Act Serves The Citizen Plaintiff's Interest In Reduced Risk Of Environmental Or Public Health Harm.

Because the imposition of a civil penalty specifically deters the Clean Water Act defendant from committing future violations, civil penalties – no less than injunctions – redress the citizen plaintiff's injury by reducing the level of pollution discharged into a waterway in which he or she has a concrete aesthetic, recreational, or economic interest. As this Court stated in *Steel Company*, "deterring [a defendant] from violating [a regulatory statute] in the future . . . can of course be 'remedial' for Article III purposes, when threatened injury is one of the gravamens" of the citizen plaintiff's action. 118 S. Ct. at 1019.

In a Clean Water Act citizen suit, there is every reason to believe that the defendant who is made to pay a monetary penalty for violating the Act will be less inclined to violate the Act in the future, especially where the defendant is a profit-maximizing company with an economic interest in avoiding future penalty liability. Indeed, in *Bennett v. Spear*, this Court held that the "powerful coercive effect" of monetary penalties on the future behavior of another was sufficient to confer Article III standing on plaintiffs who had invoked the citizen suit provision of the Endangered Species Act. *See* 520 U.S. at 170.

The plaintiffs in *Bennett* challenged the adequacy of a biological opinion issued by the United States Fish and Wildlife Service under the Act. 520 U.S. at 157. The plaintiffs claimed prospective injury because restrictions on lake levels recommended in the biological opinion for the protection of endangered species would, if followed by the Bureau of Reclamation, reduce the amount of water available to the plaintiffs for irrigation. *Id.* at 160 and 167.

The United States argued that the claim did not present a case or controversy under Article III because the Bureau of Reclamation itself was not before the court, and was not, in any event, legally obligated to follow the recommendations set forth in the biological opinion. *Id.* at 168-9. Thus, the United States argued, an order setting aside the biological opinion would not redress the alleged injury. *See id.* This Court disagreed.

> The [Bureau] is technically free to disregard the Biological Opinion . . . but it does so at its own peril (and that of its employees), for 'any person' who knowingly 'takes' an endangered or threatened species is subject to . . . civil fines of up to $25,000 per violation and criminal penalties of up to $50,000 and imprisonment of up to one year . . .

Id. at 170.

In the case at bar, as in *Bennett v. Spear*, the redressability element of Article III is met because penalties have a predictable effect on future behavior. To be sure, the two cases present different situations, but the underlying principle is the same. In *Bennett*, redressability was met because of the likely effect of the threat of penalties on a public agency that had not yet violated the law. Here, it is met by the likely effect of imposing a penalty on a profit-maximizing company that has thus far violated the law with impunity. In either case, redressability is met because penalties deter violations of the law, just as Congress envisioned.

In fact, redressability is more obviously satisfied in this case, where a violator is being prosecuted directly by citizens, than in cases such as *Bennett*, where the plaintiff sues the government seeking to influence the behavior of a party who is not before the court. In those cases, this Court has employed a stricter standard for determining

whether an Article III case or controversy exists. *See Lujan v. Defenders of Wildlife*, 504 U.S. at 562 ("When . . . a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed[,]" because in such situations "[t]he existence of one or more of the essential elements of standing depends on the unfettered choices made by independent actors not before the courts . . . ") (emphasis in original) (citation and internal quotes omitted); *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 41, 46 (1976) (federal courts "act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court.") (construing *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973)). In such cases, unless the causal chain leading to redressability is clearly demonstrated, the plaintiff has shown no more than an "undifferentiated public interest" in "vindication of the rule of law" by the government. *Steel Company*, 118 S. Ct. at 1018 (citation and internal quotes omitted).

In the case at bar, on the other hand, the heightened standard of redressability is not applicable, because the party whose conduct the plaintiffs seek to affect – Laidlaw – *is* before the court. The plaintiffs do not seek to compel government prosecution, but rather are themselves prosecuting the very defendant that is causing them injury. If the "coercive effect" of penalties was sufficient to meet the heightened standard of redressability applied in *Bennett*, 520 U.S. at 170, it should be sufficient here as well. It was not sufficient in *Steel Company*, however, because there was no allegation in that case that the defendant would violate in the future. Accordingly, the plaintiffs there had shown

no more than the "undifferentiated public interest" in general deterrence of the regulated community.[13]

II. A DEFENDANT BEARS A HEAVY BURDEN IN ATTEMPTING TO PROVE THAT ITS COMPLIANCE WITH THE LAW HAS MOOTED THE CASE.

Even if Congress had not determined that penalties must be imposed on Clean Water Act defendants to deter their future misconduct, violators who come into compliance with the Act after being sued would bear a heavy burden in attempting to establish that they will not violate in the future (and thus that there is no need for deterrence). As this Court held in *United States v. Phosphate Export Assn., Inc.*, 393 U.S. 199, 203 (1968):

> Mere voluntary cessation of allegedly illegal conduct does not moot a case; if it did, the courts would be compelled to leave "[t]he defendant . . . free to return to his old ways." *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953); *see, e.g., United States v. Trans-Missouri Freight Assn.*, 166 U.S. 290 (1897).

This Court has made it difficult for a defendant to establish that its post-complaint return to lawful behavior

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[13] This is not to say that the public interest is not relevant to a determination of redressability. When citizens have been authorized by Congress to enforce a public law, redressability should account for public, as well as private, benefits. Adoption of this view of redressability would be consistent with the common law tradition of encouraging citizens to enforce public laws through *qui tam* and *quo warranto* actions. *See generally*, George Van Cleve, *Congressional Power to Confer Broad Citizen Standing in Environmental Cases*, 29 ENVT'L L. REP. 10028 (1999). *See also Japan Whaling Assoc. v. American Cetacean Society*, 478 U.S. 221, 220 n.4 (1986).

has made a case moot. As stated in *Gwaltney*, "[i]n seeking to have a case dismissed as moot . . . the defendant's burden 'is a heavy one.' " 484 U.S. at 66 (*quoting United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953)).

> The defendant must demonstrate that it is '*absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur.' *United States v. Phosphate Export Assn., Inc.*, 393 U.S. 199, 203 (1968).

Gwaltney, 484 U.S. at 66 (emphasis added). This heavy burden "protects plaintiffs from defendants who seek to evade sanction by predictable 'protestations of repentance and reform.' *United States v. Oregon State Medical Society*, 343 U.S. 326, 333 (1952)." *Id.* at 67.

As noted in *Steel Company*, 118 S. Ct. at 1020, a presumption of future injury "applie[s] to refute the assertion of mootness by a defendant who, when sued in a complaint that alleges present or threatened injury, ceases the complained-of activity."[14] This presumption fully supports the congressional determination that Clean Water Act defendants need to be penalized to deter their propensity to commit future violations.

As this Court has stressed, arguments that post-complaint changes have eliminated the underlying case or

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[14] In *Steel Company*, this Court contrasted the situation where a defendant complies after the complaint is filed – a situation, like the one in the case at bar, in which the presumption of future injury does apply – with the situation where a defendant takes the steps necessary to attain lasting compliance before the complaint is filed, a situation in which the presumption does not apply. 118 S. Ct. at 1020. This Court has been unwilling to apply the presumption for the purpose of attaining initial Article III jurisdiction (standing), but does employ it for the purpose of *retaining* such jurisdiction (mootness). *See id.*

controversy are to be evaluated under principles of mootness, not standing.[15]

And while mootness and standing are related, they are not the same. This Court has described mootness as " 'the doctrine of standing set in a time frame,' " *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.22 (1997) (citation omitted).[16] The difference in time frame produces differences in the Article III analysis. When a defendant claims that its *post-complaint* change in conduct has deprived the court of an Article III case or controversy, the burden of proof shifts from the plaintiff to the defendant, a presumption of ongoing harm applies, and the nature of the inquiry shifts from the plaintiff's qualifications to the defendant's conduct.

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[15] *Steel Company* acknowledges this distinction in rejecting an argument by the United States that the presumption of ongoing harm applied when analyzing a defendant's claim of mootness should be invoked to assist a plaintiff in establishing standing. *See* 118 S. Ct. at 1020 ("The 'presumption' the Government refers to has been applied to refute the assertion of *mootness* by a defendant who, when sued in a complaint that alleges present or threatened injury, ceases the complained-of activity. . . . It is an immense and unacceptable stretch to call the presumption into service as a substitute for the allegation of present or threatened injury upon which initial *standing* must be based.") (emphasis added). *See also Gwaltney*, 484 U.S. at 69 (Scalia, J., concurring) ("It does not suffice to defeat subject matter jurisdiction that the success of the attempted remedies becomes clear months or even weeks after the complaint is filed. Subject matter jurisdiction 'depends on the state of things at the time of the action brought'; if it existed when the suit was brought, 'subsequent events' cannot 'oust[ ]' the court of jurisdiction.") (citations omitted).

[16] Unlike the case at bar, *Arizonans* involved post-complaint changes in the *plaintiff's* status, 520 U.S. at 72, as opposed to post-complaint changes in the *defendant's* conduct.

In the case at bar, the district court found after a trial that Laidlaw needed to be deterred from violating the Act in the future, and accordingly imposed a $405,800 penalty. Laidlaw did not meet the heavy burden of establishing that such deterrence is not necessary.[17]

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[17] Laidlaw may now argue that this case became moot *after* the Fourth Circuit issued its decision, by virtue of the reported closing of Laidlaw's plant. There are no facts in the record to indicate that Laidlaw has met its heavy burden of proving the case is moot due to the reported plant closing. Furthermore, the plaintiffs are entitled to discovery as to the nature of the plant closure, and should be given an opportunity to submit their own evidence on that issue. *See, e.g., Reich,* 102 F.3d at 1203 (expressing concern that defendants would attempt "to avoid a penalty by going out of business and, perhaps, then reincorporating under a different name."). Moreover, if this Court does conclude that Laidlaw has met its heavy burden of proving that this case is moot due to the plant closure, the decision of the Fourth Circuit, but not the decision of the district court, should be vacated. In assessing how to dispose of an otherwise moot case, this Court has made it clear that the inquiry should consist of an equitable analysis focusing on the cause of the mootness. *United States Bancorp Mortg. Co. v. Bonner Mall Partnership,* 513 U.S. 18, 24 (1994). As this Court explained in *Bancorp*: "A party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment. *The same is true when mootness results from unilateral action of the party who prevailed below." Id.* at 25 (emphasis added). If this Court concludes that Laidlaw's closing of the plant mooted the case, the plaintiffs will have been prevented from obtaining review of the Fourth Circuit's decision solely by Laidlaw's unilateral action in closing the plant, and that decision should be vacated.

III. REGARDLESS OF WHETHER THE CASE IS MOOT, PLAINTIFFS ARE ENTITLED TO ASSERT THEIR CLAIM FOR REASONABLE ATTORNEYS' FEES UNDER THE CLEAN WATER ACT.

A. When A Case Becomes Moot Through No Fault Of The Plaintiff, The Federal Courts Retain Jurisdiction To Adjudicate The Plaintiff's Claim For Statutory Attorneys' Fees.

Regardless of whether the underlying merits of a citizen plaintiff's claims are moot, the federal courts retain jurisdiction to determine whether the plaintiff is entitled to an award of statutory costs, including attorneys' fees,[18] under the Clean Water Act. *See* 33 U.S.C. § 1365(d). It is well-settled that a dispute over litigation costs and attorneys' fees is separable from the merits of the underlying case, *see, e.g., Budinich v. Becton Dickinson and Co.,* 486 U.S. 196, 202-3 (1988), and that federal courts retain jurisdiction to adjudicate disputes over costs and fees even after the underlying litigation has been resolved. *Cooter & Gell v. Hartmarx Corp.,* 496 U.S. 384, 395-6 (1982) ("It is well established that a federal court may consider collateral issues after an action is no longer pending. . . . Thus, even years after the entry of a judgment on the merits a federal court could consider an award of counsel fees.") (quotations and citations omitted).

In the mootness context, this Court has explicitly recognized the ancillary power of federal appellate courts to award costs and fees when a case is mooted pending appeal. *Bancorp,* 513 U.S. at 21. This principle applies

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[18] The Clean Water Act's citizen suit provision specifies that attorneys' fees and expert witness fees are to be taxed and collected as "costs." 33 U.S.C. § 1365(d).

throughout the course of federal litigation: whenever a district court, court of appeals or this Court determines that a controversy is moot, that court retains jurisdiction to dispose of the case "as justice may require," *id.* at 21-22 (citations and quotations omitted), including, in appropriate circumstances,[19] an award of fees and costs.

The same residual power allows courts to resolve conflicts over statutory fees after settlement of the underlying dispute. *See Maher v. Gagne*, 448 U.S. 122, 129 (1980) (recognizing power of federal courts to award post-settlement attorneys' fees to prevailing plaintiff under Civil Rights Attorney's Fees Awards Act). Since settlement of the underlying merits moots a case except as to fees, *see, e.g., Bancorp*, 513 U.S. at 20, this Court's approval of post-settlement fee litigation confirms that, like appellate courts, federal district courts retain jurisdiction over ancillary matters like fee disputes even after the underlying merits have become moot.[20]

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[19] These circumstances would include where fees and costs are available by common law, *see, e.g., Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161 (1939) (awarding fees several years after entry of judgment to plaintiff who produced benefit commonly available to others similarly situated), or, as here, by statute. *See Bancorp*, 513 U.S. at 22 ("Congress may authorize us to enter orders necessary and appropriate to the final disposition of a suit that is before us for review.") As discussed *infra*, Part III.B., Congress intended the district court's authority to award litigation costs under section 505(d) of the Clean Water Act to a "prevailing or substantially prevailing party" to extend to cases where the plaintiff's suit is a catalyst for the defendant's post-complaint compliance with the Act.

[20] Every circuit to address the issue, including the Fourth Circuit, has ruled that federal district courts retain jurisdiction after a case is mooted to assess whether the plaintiff was a "prevailing party" for purposes of statutory fees. *See, e.g., Comfort Lake Ass'n, Inc. v. Dressel Contracting, Inc.*, 138 F.3d 351, 357 (8th Cir. 1998) (Clean Water Act); *Atlantic States Legal Found., Inc. v. Eastman Kodak Co.*, 933 F.2d 124, 128 (2d Cir. 1991) (same); *Grano v. Barry*, 783 F.2d 1104, 1108 (D.C. Cir. 1986) (Civil Rights Attorney's Fees Awards Act); *Doe v. Marshall*, 622 F.2d 118, 120 (5th Cir. 1980), *cert. denied*, 462 U.S. 993 (1980) (same); *Williams v. Alioto*, 625 F.2d 845, 848 (9th Cir. 1980), *cert. denied*, 450 U.S. 1012 (1980) (same); *Bagby v. Beal*, 606 F.2d 411, 413 (3d Cir. 1979) (same); *S-1 and S-2 v. State Bd. of Educ. of North Carolina*, 21 F.3d 49, 51 (4th Cir.) (en banc) (per curiam), *cert. denied*, 513 U.S. 876 (1994) (same).

This Court has implicitly recognized in the specific context of a Clean Water Act citizen suit that a plaintiff's claim for costs and attorneys' fees survives the mooting of the underlying merits where the mooting event is caused by the unilateral conduct of the defendant. *See Gwaltney*, 484 U.S. at 67 n.6. This case presents precisely the situation the Court envisioned in *Gwaltney*: a defendant that comes into compliance during the pendency of a citizen suit. If a defendant's post-complaint achievement of compliance is sufficient to evade an obligation to pay the litigation costs of a prevailing citizen plaintiff, citizen suit plaintiffs would be deprived of the very protection identified by the Court in *Gwaltney*. A citizen plaintiff could devote substantial time and resources to enforcing the Clean Water Act against a persistent violator, only to have the plaintiff's entitlement to statutory fees eliminated by the defendant's decision to do that which the plaintiff seeks.[21]

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[21] Enforcement of the Act would be seriously undermined, since citizen plaintiffs without resources to pay an attorney would be unlikely to find one who is willing to accept the risk that the case will be mooted – and the right to attorneys' fees eradicated – by the defendant's unilateral conduct, even years into the litigation.

B. Under The Clean Water Act, A Plaintiff Is Entitled To An Award Of Fees When The Citizen Suit Is A Catalyst In Bringing The Defendant Into Compliance.

A citizen plaintiff whose suit is a catalyst in bringing a defendant into compliance is a "prevailing or substantially prevailing party" for purposes of a fee award under the Clean Water Act. The Act's citizen suit provision provides in pertinent part:

> The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate.

33 U.S.C. § 1365(d). A citizen plaintiff who "has succeeded on 'any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing suit' . . . has crossed the threshold to a fee award of some kind" as a prevailing party. *Texas State Teachers Assn. v. Garland Independent School District*, 489 U.S. 782, 791-92 (1989) (construing 42 U.S.C. § 1988, and citing *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978)). The critical question in determining whether a party is "prevailing" is whether, at a minimum, the plaintiff can "point to a resolution of the dispute which changes the legal relationship between itself and the defendant." *Id.* at 792.

Thus, a plaintiff need not obtain a judgment, nor even enter into a formal settlement, to be considered a prevailing party:

> A lawsuit sometimes produces voluntary action by the defendant that affords the plaintiff all or some of the relief he sought through a judgment – *e.g.*, a monetary settlement or a change in conduct that redresses the plaintiff's grievances. When that occurs, the plaintiff is deemed to have prevailed despite the absence of a formal judgment in his favor.

Hewitt v. Helms, 482 U.S. 755, 760-61 (1987) (citation omitted). Conversely, even a nominally favorable judgment will not afford a plaintiff "prevailing" party status if the judgment fails to "affect[ ] the behavior of the defendant toward the plaintiff." *Rhodes v. Stewart*, 488 U.S. 1, 4 (1988). In short, it is the result that matters.

Here, after the complaint was filed, Laidlaw brought its mercury discharges into compliance with the Act and the plaintiffs thus have "crossed the threshold" to prevailing party status.[22]

In holding that the plaintiffs are not entitled to recover attorneys' fees, the Fourth Circuit misreads both this Court's decision in *Farrar v. Hobby*, 506 U.S. 103 (1992), and the language and legislative history of section 1365(d). *Amici* adopt the arguments presented in the briefs of plaintiffs and of *amici curiae* Public Citizen and the American Civil Liberties Union demonstrating that *S-1 & S-2*, 21 F.3d at 51, wrongly held that *Farrar v. Hobby* overruled the "catalyst" doctrine in attorneys' fee awards.

Moreover, Congress specifically intended that a citizen plaintiff whose Clean Water Act suit is a catalyst in

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[22] This is in contrast to cases where an order vacating a judgment on grounds of mootness *deprives* a plaintiff of relief, in which the plaintiff cannot be said to be a prevailing party. *See, e.g., Lewis v. Continental Bank Corp.*, 494 U.S. 472 (1990) (change in legal framework governing the case during pendency of appeal deprived plaintiff of its claim for relief). Here, it is plaintiffs' *success* in changing the defendant's behavior prior to judgment that arguably renders the case moot.

bringing a defendant into compliance be considered a "prevailing or substantially prevailing party." Before the 1987 amendments to the Clean Water Act, section 1365(d) provided that fees may be awarded to "any party, whenever the court determines such an award is appropriate." *See Gwaltney*, 484 U.S. at 67 n.6 (quoting previous version of statute). In enacting that provision, Congress stated that an award of costs:

> should extend to plaintiffs in actions which result in successful abatement but do not reach a verdict. For instance, if as a result of a citizen proceeding and before a verdict is issued, a defendant abated a violation, the court may award litigation expenses borne by the plaintiffs in prosecuting such actions.

Id. (*quoting* S. Rep. No. 92-414, at 81 (1971)).

Congress amended section 1365(d) in 1987 to add the words "prevailing or substantially prevailing" before "party." On its face, the plain language of this amendment does not alter the conclusion reached in *Gwaltney*. Indeed, the amendment merely brings the Clean Water Act's attorneys' fees provision into closer alignment with the language of the civil rights statutes.[23] And by 1987, it was already "settled law . . . that relief need not be judicially decreed in order to justify a fee award" under the civil rights statutes. *Hewitt v. Helms*, 482 U.S. at 760. Since it is presumed that Congress expects its statutes to be read in conformity with Supreme Court precedent,

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[23] If anything, by using the phrase "prevailing *or substantially prevailing*," Congress made the universe of plaintiffs entitled to fees under the Clean Water Act even larger than that under the Civil Rights Attorneys' Fee Awards Act, 42 U.S.C. § 1988, which only provides for fees to "prevailing" parties.

United States v. Wells, 519 U.S. 482, 495 (1997), Congress's deliberate use of the "prevailing party" language in section 1365(d) must be understood to encompass plaintiffs who succeed by virtue of the defendant's post-complaint compliance.

The legislative history of the 1987 amendments also makes clear that Congress did not intend to reverse itself and preclude an award of fees to a citizen plaintiff whose suit serves as the catalyst spurring a defendant to abate its violations of the Act before a verdict is issued. Instead, this amendment had a single, and very different, purpose: to ensure that plaintiffs who affirmatively *lose* on all litigated issues do not receive fee awards.

The Senate Report on the 1987 amendments states that Congress was reacting to the decision in *Sierra Club v. Gorsuch*, 672 F.2d 33 (D.C. Cir. 1983), *rev'd sub nom. Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983), in which

> the court of appeals held that it was 'appropriate' to award fees under the Clean Air Act to the petitioner even though the government had prevailed on all issues. . . . Accordingly, these amendments [to 1365(d) and adding a new section 1369(b)(4)] would limit the awarding of costs under the Clean Water Act to prevailing or substantially prevailing parties.

S. Rep. No. 99-50, at 33 (1985). Emphasizing that it is not appropriate to assess costs "when the opposing party has not prevailed on the issues," the Senate Report makes clear that in other respects the fee-shifting provision of the Act was *not* being altered, by listing several examples. Fees may still be awarded, as before, to "a partially prevailing party with respect to the issues on which that party has prevailed" and to a party who has achieved "a successful settlement," and fees may be denied, as before, to a party "technically on the prevailing side [who] fails

to make a substantial contribution to the successful outcome of the case." *Id.*

No negative inference should be drawn from Congress's failure to specifically list the situation presented here – that of a defendant who abates its violations before a judgment or settlement is reached – since that situation is omitted both from the enumerated situations in which a party *is* entitled to costs and from the enumerated situations in which a party is *not* entitled to costs. If any inference is to be drawn, it is that if Congress had meant to preclude an award of costs under circumstances where it previously had allowed such awards, Congress would have said so.

Accordingly, even if this Court were to conclude that the underlying dispute here is now moot, the case should be remanded for the district court to assess whether the plaintiffs qualify as "prevailing or substantially prevailing part[ies]" under section 1365(d).[24]

Respectfully submitted,

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[24] Since the district court implicitly found that plaintiffs are entitled to an award of statutory fees, *Laidlaw*, 956 F. Supp. at 610-11, the sole remaining issue may be the determination of a "reasonable" amount under the statute. *See* 33 U.S.C. § 1365(d).

Supreme Court, U.S.
FILED
MAY 17 1999
CLERK

(12)

No. 98-822

IN THE
Supreme Court of the United States

FRIENDS OF THE EARTH, *et al.*,

Petitioners,

v.

LAIDLAW ENVIRONMENTAL SERVICES (TOC), INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICUS CURIAE* OF AMERICANS FOR THE ENVIRONMENT IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST

Amicus curiae Americans for the Environment is a national environmental organization that provides training and technical assistance to citizen leaders and elected officials working to protect the environment and public health.[1] Americans for the Environment has an interest in this case because it raises a fundamental challenge to the authority of Congress to include a citizen suit provision in the Clean Water Act to counteract the significant practical obstacles American citizens would otherwise encounter in advocating effective implementation of the Act.

SUMMARY OF ARGUMENT

This *amicus* brief presents three arguments. First, the Court has erred in its prior environmental standing cases by relying on a formalistic understanding of the American political system that ignores the significant barriers in the political process to expression of the broad public interest in environmental protection. The Court's environmental standing decisions over the last decade have narrowed the standing of citizens alleging injuries to their interests in a clean environment, while simultaneously expanding the standing of regulated businesses to challenge environmental regulation. These decisions are based, at least in part, on the mistaken idea that environmental and other majoritarian interests neither need nor deserve access to the courts because, simply by virtue of their numbers, their concerns will be addressed appropriately through the political process. In fact, as a result of free rider problems and the high costs of collective

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[1] Counsel for the parties have consented to the filing of this *amicus* brief, and the letters of consent are being filed with the Clerk simultaneously with the filing of this brief. No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than *amicus* or their counsel, made a monetary contribution to this brief's preparation or submission. *See* Supreme Court Rule 37.

political action, effective expression of the broad public interest in environmental protection faces major obstacles in the American political system.

Second, the Court's recent environmental standing decisions are mistaken insofar as they rely on the idea that the courts should narrow citizen standing so that, in the words of Justice Scalia, congressional mandates will "get lost or misdirected" in the administrative implementation process. This idea contradicts the established principle that the judiciary should defer to Congress in the establishment of administrative policies. The citizen suit provision of the Clean Water Act represents a reasonable and entirely legitimate effort by Congress to promote effective implementation of the Act and to counteract the danger that the regulated community could successfully undermine the Act during the administrative implementation process. The courts have no authority to select those particular congressional policies which they believe should be "lost or misdirected."

Finally, contrary to the reasoning in the Court's recent environmental standing decisions, there is no basis in Article III for imposing special limitations on access to the federal courts for those seeking to protect their interests in environmental quality. This is especially true when, as in this case, Congress has passed legislation (which was approved by the President) specifically authorizing the bringing of the action, and the suit is against a private firm, not another branch of government. It is the decision of the court below, by refusing to enforce the Clean Water Act citizen suit provision as Congress intended, that threatens the separation of powers principle underlying Article III.

ARGUMENT

I. The Anti-Majoritarian Theory Underlying Modern Environmental Standing Decisions Ignores the Realities of the American Political Process.

Over the last decade, the Court has dramatically revised the law of standing to limit citizens' ability to sue in federal court to enforce federal environmental laws. This transformation has been based on the idea that those asserting a "majoritarian" interest in environmental protection neither require nor are entitled to regular access to the courts, whereas minority regulated interests need and should routinely be granted access to the courts to challenge the application of the environmental laws to them.

This novel theory of unequal standing is based on a mistaken empirical assumption about the operation of the American political process: that majoritarian interests generally are fairly recognized and accurately reflected in the political process. A large body of academic literature, common sense, and substantial empirical evidence demonstrate that this premise is simply wrong.

The basic rationale for the Court's recent environmental standing decisions is expressed most articulately by Justice Scalia, writing for the Court in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). He explained the distinction between those interests which should be denied standing and those which should be granted standing in terms of whether the plaintiff is the object, or the intended beneficiary, of a law or regulation. Standing, he said,

> "depends considerably upon whether the plaintiff is himself an object of the action (or foregone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will

> redress it. When, however, as in this case, a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed."

Id. at 561-62 (emphasis in original). While the quoted language is from the opinion of the Court, it is uncertain, in view of the separate concurring opinion by Justice Kennedy (joined by Justice Souter), *see* 504 U.S. at 579-81, whether a majority of the Court actually subscribed to this part of the majority opinion. *See also id.* at 579 (expressing agreement only with "the essential parts of the Court's analysis").

Justice (then Judge) Scalia developed this theory of the distinction between beneficiaries and objects of regulation in a 1983 article in the Suffolk University Law Review. *See The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U.L.Rev. 881 (1983). Judge Scalia argued that standing doctrine needed to be revised, in his words, to "restrict[ ] courts to their traditional undemocratic role of protecting individuals and minorities against impositions of the majority, *and [to] exclud[e] them from the even more undemocratic role of prescribing how the other two branches should function in order to serve the interest of the majority itself.*" *Id.* at 894 (emphasis added).

Judge Scalia contended that when a claim is brought by an individual who is "the very *object* of a law's requirement or prohibition," then the plaintiff will "always" have standing. *Id.* at 894 (emphasis in original). In that circumstance, the claim presents a "classic case of the law bearing down upon the individual himself, and the court will not pause to inquire whether the grievance is a 'generalized' one." *Id.* On the other hand, using language almost identical to that which appeared in *Lujan*, when the plaintiff "is complaining of an agency's unlawful *failure* to impose a requirement or

prohibition upon *someone else*," standing should be much more difficult to establish. *Id.* at 894 (emphasis in original). A legal challenge based on non-enforcement of the law asserts an essentially majoritarian interest, Judge Scalia reasoned, which should ordinarily be addressed, not by the courts, but by the majoritarian branches - the Congress or the Executive. A plaintiff with a majoritarian interest should be recognized as having standing only if he can demonstrate that non-enforcement of the law resulted in some special and distinctive harm to him. *Id.* at 894-95.

Over the last decade, the Court's major environmental standing decisions, all of which have been authored by Justice Scalia, have progressively implemented this anti-majoritarian theory of standing. In all of the cases involving claims by citizens or citizens groups alleging violations of the environmental laws, the Court has rejected the plaintiffs' standing and narrowed the circumstances in which citizens can sue to protect their environmental interests in the future. *See Steel Company v. Citizens for a Better Environment*, 118 S.Ct. 1003 (1998); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990). On the other hand, consistent with the view that minority interests should have superior access to the courts, the Court in *Bennett v. Spear*, 520 U.S. 154 (1997), ruled that representatives of narrow economic interests had standing to challenge the implementation of federal environmental laws which allegedly harmed them.

One basic problem with this anti-majoritarian theory of standing is that it conflicts with the facts of the American political process. Contrary to the assumption that majoritarian interests get accurately expressed through the political process, citizens advocating majoritarian interests of many different kinds - consumers of retail products or services, citizens exposed to chronic health risks, or families seeking to

prevent environmental degradation in their communities — face severe obstacles to getting their views expressed in the political process. By contrast, both in absolute terms and in relation to their numbers, relatively narrow interests have significant advantages in advancing their agendas in the political process.

As academic commentators have long recognized, those who share an interest with a broad cross-section of society labor under two basic problems in seeking to advance their agenda through the political process: the so-called "free rider" problem and relatively high transaction costs. *See generally* Mancur Olson, THE LOGIC OF COLLECTIVE ACTION (1965). The free rider problem has been concisely described by Professor Jonathan Macey:

> "By definition, the benefits from public spirited legislation fall on the public generally. As such, it is extremely unlikely that any individual will find it advantageous to devote privately the necessary resources to obtain such legislation. Those members of the public who spend nothing will have a free ride at the expense of those who invest in public-regarding legislation. Since any gain goes to the group as a whole, those who contribute nothing benefit just as much as those who have contributed a great deal. Thus it pays for each individual to do nothing and to hope that others will make an effort upon which he can 'free ride.'"

Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 Colum. L. Rev. 223, 231 n. 44 (1986). The free rider problem is particularly serious when the interest at issue is a broadly shared public good, such as clean water or clean air. Because the benefits of a public good accrue to everyone,

regardless of individual contribution, and because the benefits are diffuse and relatively small compared to the total effort required for their achievement, individuals will, if they are rational economic actors, free ride on the efforts of others rather than invest their own time and energy in political activity. E. Donald Elliot et al., *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, J.L. Econ. & Org. 313, 342 (1985).

By contrast, when the interest being advanced is not a public good, but is concentrated in a few firms or individuals sharing a specialized interest, and when the return to any individual from collective action is high relative to the costs of group activity, concerted political activity does not face a free-rider problem. Olson, at 33-36. Furthermore, in contrast with groups seeking to advance a public good, it is easier for narrow interest groups to police against free-riders, either by offering added incentives for involvement in the group or by sanctioning members of the interest group for non-participation. Macey, at 229. Finally, smaller size can support sentiments of solidarity which help overcome the free rider problem. David Knoke, ORGANIZING FOR COLLECTIVE ACTION 38-40 (1990).[2]

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[2] Some commentators have suggested that, in some cases, effective political organizers can counteract the free rider problem by offering "expressive" or "solidarity" incentives for collective political action. *See* Paul E. Johnson, *Interest Group Recruiting, Finding Members and Keeping Them*, in Alan J. Cogler & Burdett A. Loomis, INTEREST GROUP POLITICS 41 (1998). Even under this view, however, collective political action on behalf of public goods faces significant obstacles, "because people who have an interest in a collective good do not tend to be 'self-starters' who seek out and join groups. Instead, they must be sought out, pursued, enticed, and persuaded." *Id.* at 60. *See also* Kay L. Schlozman & John T. Tierney, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY 128 (1986) ("most consumer and environmental groups enroll only a minuscule proportion of all who share their goals").

The second obstacle facing advocates of broadly shared interests is high transaction costs. Olson, at 48; *see also* Bruce A. Ackerman, *Beyond Carolene Products*, 98 Harv.L.Rev. 713 (1985). Identifying like-minded individuals, communicating with the group, and motivating members to take concerted political action all require investments of time and money. The larger the group and the smaller the individual stake in the issue by each member, the higher the costs to achieve a given level of political effectiveness. Macey, at 229. For all the same reasons, the smaller the group, the lower the transaction costs to achieve the same level of effectiveness. Ackerman, at 727.

As a result of both of these obstacles, contrary to the formalistic premise of the Court's environmental standing decisions, citizens with broadly shared environmental interests will, everything else being equal, exercise far less political influence than their bare numbers would suggest. In practical terms, "the [diffuse] group is less likely to have a well-organized lobby to press its cause. It is also less likely to have the communications network necessary for the lobby's leaders credibly to threaten Congressman with the prospect of electoral retribution." Ackerman, at 727-28.

The available empirical evidence confirms that majoritarian interests face major obstacles in the political process. For example, in ORGANIZED INTERESTS AND AMERICAN DEMOCRACY, the most comprehensive study of special interest influence on American politics, Kay L. Schlozman and John T. Tierney conclude that:

> In general, organized interest politics tends to facilitate articulation of demands by the narrowly interested and well organized. By and large, the collectivities thus benefitted are well heeled; business, in particular, finds pressure politics a

> useful mechanism for pursuing political goals. Larger aggregates, especially the less advantaged and those seeking nondivisible public goods, such as clean air and lower taxes, fare rather less well through the agency of organized interest politics than they do elsewhere in the American political process.

Id. at 400. *See* also Macey, at 232 ("everyone who buys milk is harmed by mild price supports; but the small cohesive lobby of milk producers nonetheless is able to obtain these subsidies'); Roger G. Noll & Bruce M. Owen, THE POLITICAL ECONOMY OF DEREGULATION: INTEREST GROUPS IN THE REGULATORY PROCESS 41-53 (observing that consumers are generally less well represented than producers, and illustrating the point by discussing the successes of concentrated agricultural interests and the steel industry's ability to lobby for and "capture nearly all of any benefits that protectionist legislation provides the industry"). *See generally* Daniel A. Farber, *Politics and Procedure in Environmental Law*, 8 J.L. Econ. & Org. 60 (1992) (observing that the collective action problem "is corroborated by the prevalence of pork barrel legislation that produces local benefits but a net social loss").[3]

In view of the substantial obstacles to organizing diffuse interests to support a particular political agenda, one might wonder how the American political system has produced any national environmental legislation at all. The most persuasive

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[3] The relative political weakness of environmental interests also is reflected in the levels of congressional campaign contributions. Total contributions by environmental political action committees in 1997-98 totaled $224,583, far less than the amounts contributed by energy and natural resource companies ($13,413,670), the agricultural sector ($14,095,910), chemical and related manufacturing ($1,517,781), and development companies ($8,300,622). *See* Center for Responsive Politics, *Political Action Committees* (1999) <www.opensecrets.org/pacs/>.

explanation is what Professor Daniel A. Farber has called a "Republican moment" in American political history. According to this view, "politics alternates between normal periods, in which public attention to an issue is weak, and extraordinary periods, in which the issue has high salience for the public." 8 J.L.Econ.& Org. at 68. The spate of national environment laws, particularly in the early 1970s, was, according to Farber, the product of one such "extraordinary" moment.

Assuming Professor Farber' s theory explains at least in part how some national environmental legislation got enacted,[4] it does not contradict the conclusion that — most of the time — the free rider and collective action problems mean that the political process is subject "to the demands of conventional interest groups." *Id*. Thus, acceptance of the idea that majoritarian environmental interests should ordinarily be addressed exclusively through the political process would mean that they frequently would not be addressed at all. Congress obviously hoped and believed that the citizen suit provision in the Clean Water Act would allow the public to play a strong role in vindicating the public commitments made in the Act. Contrary to the ungrounded anti-majoritarian theory of standing, limiting citizen standing to invoke the Act's citizen suit provision would simply reinforce the imbalance in the political process which already works to the disadvantage of members of the public interested in environmental protection.

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[4] *But Compare* E. Donald Elliott et al., at 326 (arguing that enactment of national clean air legislation helped serve interests of automobile and coal industries); Robert Zener, *The Federal Law of Water Pollution*, in FEDERAL ENVIRONMENTAL LAW 784-86 (1974) (arguing that enactment of Clean Water Act helped legalize pollution discharges).

II. The Clean Water Act Citizen Suit Provision Represents a Legitimate Congressional Response to the Danger of Undue Influence By the Regulated Community On the Implementation of Federal Environmental Law.

Then Judge Scalia, in his 1983 law review article, acknowledged that limiting citizen standing to sue to enforce environmental laws could encourage administrative nullification of federal environmental legislation. He viewed this possibility in an entirely positive light. He asked: "Does what I have to say [about standing] mean that, so long as no minority interests are affected, 'important legislative purposes, heralded in the halls of Congress [can be] lost or misdirected in the vast halls of the federal bureaucracy?'" 17 Suffolk Univ. L.Rev, at 897. And he answered: "Of *course* it does - and a good thing, too," because there is no harm done when legislative mandates "get lost or misdirected." *Id*. (emphasis in original). Indeed, in his view, "[t]he ability to lose or misdirect laws can be said to be one of the prime engines of social change, and the prohibition against such carelessness is (believe it or not) profoundly conservative." *Id*. In short, citizens should be denied standing to enforce the law to facilitate agency *disobedience* of congressional mandates and thereby promote administrative innovation.

In the Clean Water Act, Congress obviously reached a different judgment about the value of allowing federal legislative purposes to be "lost or misdirected in the vast halls of the federal bureaucracy." It is perhaps a fair question for *legislative* debate whether Congress should craft environmental legislation to tightly control administrative discretion or to promote flexibility and innovation. But the choice properly belongs to Congress and Congress' determination on this point is entitled to great deference. Certainly the courts have no authority to deploy standing

doctrine to select those particular policies which they believe should be "lost or misdirected."

The citizen suit provision in the Clean Water Act represents a reasonable and entirely legitimate effort by Congress to address the risk of "agency capture" by the regulated community, a well recognized, pervasive challenge to the fairness of the entire federal administrative process. *See* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1667, 1713 (1975) ("It has become widely accepted, not only by public interest lawyers, but by academic critics, legislators, judges and even by some agency members, that the comparative over-representation of regulated or client interests in the process of agency decision results in a persistent policy bias in favor of these interests.") The risk of capture arises from the same basic problem affecting the legislative process, the imbalance of power between diffuse public interests and discrete firms and individuals subject to regulation. Indeed, if anything, the imbalance is greater in the administrative process than in the legislative process, given the so-called "revolving door" problem, the arcane technical and legal character of many administrative procedures, and the time-consuming nature of agency processes. *See id.* at 1713-14; Dion Casey, Note, *Agency Capture: The USDA's Struggle to Pass Food Safety Regulations*, 7 Kansas J.Law & Pub.Pol. 142, 142-43 (1998) (cataloguing the explanations for agency capture).

Concerns about agency capture apply with full force in the environmental arena, where implementation efforts pit highly diffuse public interests against highly motivated polluters subject to potentially costly abatement obligations. *See* Schlozman & Tierney, at 400. *See also* Michael C. Blumm, *Public Choice Theory and the Public Lands: Why 'Multiple Use' Failed*, 18 Harv. Envtl. L. Rev. 405, 407-08 (1994) (the concern that "well organized special interest

groups will exert a disproportionate influence on policy-making" is "particularly relevant in the case of public lands, where the interests of disorganized, distant public owners are regularly overshadowed by the opposing interests of locally concentrated commodity interests").

The historical context and legislative history of the Clean Water Act citizen suit provision (and of the Clean Air Act citizen suit provision upon which the CWA provision was modeled) confirm that Congress adopted this provision out of concern about the danger of agency capture. *See* S. Rep. No. 91-1196, 91st Cong., 2d Sess. 36-39 (1970). *See also* Statement of Senator Bayh during Senate consideration of the conference committee report, October 4, 1992, *reprinted in*, LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, Vol. II. at 217 (Senate Public Works Comm. Print 1973) (describing citizens suit provisions as "a very important tool for keeping industry and government alike from letting standards and enforcement slip"). Leading academies have frequently observed that concerns about agency capture motivated Congress to adopt the citizen suit provisions. *See* R. Percival, Environmental Regulation: Law, Science, and Policy 181 (1996) ("When it enacted the environmental laws, Congress was aware of the extensive literature suggesting that regulatory agencies tend to become the captives of the regulated industry. To resist this agency capture model of the process, action-forcing provisions such as the citizen suits and provisions for judicial review were incorporated into the environmental statutes."); C. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 Mich. L.Rev. 163, 192-93 (1992) ("[s]purred by... suspicion of agency 'capture,' Congress created a wide range of citizens' suits;" "[w]ith a number of devices, including the citizen suit, Congress hoped to overcome administrative laxity and unenthusiasm, and also to

counteract the relatively weak political influence of beneficiaries").

Because Congress adopted the Clean Water Act citizen suit provision to address the danger of agency capture and consequent skewing of administrative implementation of the Act, limiting the scope of the provision would directly frustrate Congress' purpose. Congress believed that citizen suits were necessary to correct a systematic imbalance of power in the administrative process. Judicial rulings limiting citizens' ability to rely upon citizen suit provisions nullify Congress' sensible and entirely permissible efforts to correct this imbalance.

Further, the idea that majoritarian interests in environmental protection should be accorded relatively *less* access to the courts than regulated entities not only leaves the imbalance of power in the administrative process unaddressed, it makes it worse. As Professor Farber has explained the point:

> "More restrictive standing rules are likely to have a differential impact. Industry groups can readily demonstrate economic harm, a traditional basis for standing. Thus, restricted standing rules will not affect their efforts to use the courts to rewrite legislative deals. When the original deal is in their favor, they will also be able to use the courts to enforce the deal. Because they lack the traditional economic injuries, environmental groups are likely to be more substantially affected by standing restrictions. Hence, they will be less able to enforce favorable legislative deals or to use the courts to rewrite deals in their favor. The net result is that restrictions on standing will tend to tug implementation away from the legislative deal toward industry interests."

8 J.L.Econ & Org. at 77. *See also* William W. Buzbee, *Expanding the Zone, Tilting the Field: Zone of Interests and Article III Standing Analysis After Bennett v. Spear*, 49 Admin.L. Rev. 764 (1997) (observing that unequal standing doctrine will inevitably cause agencies to deal with the regulated community and the general public in a non-evenhanded fashion, based on which interest is most likely to sue the agency successfully if it makes a mistake).

III. Article III of the Constitution Mandates Judicial Respect for, Rather than Judicial Abrogation of, Citizen Suit Provisions.

It would create no fundamental problem under Article III of the Constitution for this Court to accept Congress' broad authority to confer standing on citizens to protect their environmental interests, even if those interests are broadly shared by other citizens. Indeed, it is the contrary view, that the judiciary may constrain Congress' authority to enact effective citizen suit provisions, which creates the genuine Article III problem in this case.

First, there is no Article III obstacle to repudiation of the anti-majoritarian rationale for the Court's recent environmental standing decisions, as the Court implicitly recognized last term in *Federal Election Commission v. Akins*, 118 S.Ct. 1777 (1998). In that case the Court upheld the standing of voters to challenge the FEC's classification of an organization under the federal election laws, rejecting the argument that plaintiffs lacked standing because they were asserting a "generalized grievance" that was "'shared in substantially equal measure by all or a large class of citizens.'" *Id.* at 1785, quoting from Brief for Petitioner. The Court acknowledge that some of its prior decisions included language suggesting that judicial relief might not be available "where large numbers of Americans suffer alike." *Id.* But, as the Court explained, these decisions actually

rested not only on the "generalized" nature of the injury, but also on the fact that the alleged injuries were "abstract or indefinite in nature." *Id.* at 1785 (distinguishing, among other decisions, the Court's decision in *Lujan*). So long as an injury is "concrete," even if it is widely shared, the Court ruled, there is no Article III standing problem. In reaching this conclusion the *Akins* Court refuted the idea implicit in *Lujan* that those asserting majoritarian interests lack standing simply because their interests are shared by many other citizens. *See Id.* at 1786 ("the fact that a political forum may be more readily available where an injury is widely shared... does not . . . automatically disqualify an interest for Article III purposes").

The conclusion that standing doctrine grants even-handed access to the courts for different types of interests properly focuses standing doctrine on the core *constitutional* issues underlying the doctrine. It comports with the established idea that the "case or controversy" limitation is intended to "help[ ] assure that courts will not 'pass upon . . . abstract, intellectual problems, but adjudicate 'concrete, living contest[s] between adversaries'. *Id.* at 1784, *quoting Coleman v. Miller*, 307 U.S. 433, 460 (1939) (Frankfurter, J. dissenting). It also comports with the understanding that standing doctrine prevents the courts from becoming entangled in essentially political issues assigned by the Constitution to the other branches of government.

Significantly, in this case, not only has Congress explicitly authorized (and the President approved) the filing of a Clean Water Act citizen suit, but this suit involves a claim against a private firm, not another branch of government. Thus, none of the primary indicia of a potential separation of powers problem are present in this case.

Second, Article III requirements are met in this case because plaintiffs satisfy the traditional three-part test for

standing, including a showing of an actual "injury," "causation," and "redressability." Congress believed that efforts to control water pollution had failed, and would continue to fail in the future, to the extent they relied upon independent showings that individual discharges caused an adverse impact on water quality. Thus, in 1972, Congress redefined the regulatory strategy to focus on technologically-defined effluent limitations. Consistent with that approach, Congress, in the citizen suit provision, defined the relevant "injury" as a "violation" of the applicable limitations. 33 U.S.C. 1365(a). *See Lujan*, 504 U.S. at 580 (Kennedy, J. concurring, joined by Souter, J.) (recognizing that "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before"); *Akins*, at 1784 ("a plaintiff suffers an 'injury in fact' when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute"). At least when, as in this case, plaintiffs demonstrated that the illegal discharges were made into a waterbody they actually use, Article III injury and causation requirements are met. Furthermore, because the violations were ongoing at the time the suit was filed, the civil penalties payable to the U.S. Treasury serve a general as well as specific deterrent effect that meets the redressability requirement. *Compare Steel Company v. Citizens for a Better Environment*, 118 S.Ct. 1003 (1998) (civil penalties do not satisfy redressability requirement where violations ceased prior to filing of citizen enforcement action). For the reasons discussed in detail in the briefs of the petitioners and other *amici*, it would be nonsensical to conclude that a firm violating the Clean Water Act at the time a suit is filed can escape liability for civil penalties, and that citizen plaintiffs can be entirely denied reimbursement of their attorneys' fees, simply because the

firm managed to come into compliance by the entry of final judgment.

Lastly, the ruling of the court below, rather than upholding the principle of separation of powers underlying Article III of the Constitution, actually infringes upon that principle by effectively invalidating the Clean Water Act citizen suit provision. Judicial invalidation of an act of Congress, whether this step is based on Article III or some other provision of the Constitution, involves the greatest possible judicial intrusion into the responsibilities of the legislative branch. This extraordinary judicial power can only be exercised sparingly and upon the clearest demonstration of the necessity for doing so. No such showing is possible with respect to the citizen suit provision of the Clean Water Act.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the U.S. Court of Appeals for the Fourth Circuit in this case.

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May 17, 1999

No. 98-822

FILED
MAY 17 1999
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

FRIENDS OF THE EARTH, INCORPORATED, *et al.*,
Petitioners,
v.
LAIDLAW ENVIRONMENTAL SERVICES (TOC), INC.,
Respondents.

ON WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF AMICUS CURIAE OF THE STATES OF CALIFORNIA, MISSOURI, ALABAMA, ARKANSAS, DELAWARE, ILLINOIS, MICHIGAN, MISSISSIPPI, NEW MEXICO, NEW YORK, NORTH CAROLINA, TENNESSEE, RHODE ISLAND, AND WASHINGTON IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a citizen suit brought under § 505 of the Clean Water Act, 33 U.S.C. § 1365, which sought injunctive and declaratory relief and civil penalties for ongoing violations of a National Pollutant Discharge Elimination System (NPDES) permit subsequently became moot, for lack of Article III redressability, where:

> (1) the NPDES permittee continued to violate its NPDES permit after suit was filed but came into compliance by the time of final judgment in the district court, and where,
>
> (2) the district court imposed civil penalties for the post-complaint NPDES permit violations, but denied injunctive relief because of the permittee's post-complaint compliance.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998
No. 98-822

FRIENDS OF THE EARTH, INCORPORATED, *et al.*,
Petitioners,

v.

LAIDLAW ENVIRONMENTAL SERVICES (TOC), INC.,
Respondents.

INTEREST OF AMICI CURIAE

Amici States have a vital interest in the standing and mootness principles applied to citizen suits brought under § 505 of the Clean Water Act (CWA), 33 U.S.C. § 1365. Along with the federal government, they are the primary enforcers and administrators of the CWA. But the states have an equally significant role as "citizens," entitled to sue under CWA's citizen suit provision. *See* 33 U.S.C. §§ 1365(g), 1362(5); *Department of Energy v. Ohio*, 503 U.S. 607, 616 (1992). Under that provision, states bring citizen suits against those who pollute interstate waters. Even federal agencies are subject to citizen suits brought by states. *Department of Energy v. Ohio*, 503 U.S. at 616. In a variety of circumstances, citizen suits provide the states a better remedy than does an enforcement action. They are an important tool for states seeking to achieve environmental protection.

The states value that tool not just for their own use, but also for its use by others. Suits brought by private citizens fill the gap in CWA enforcement left by a lack of

governmental resources. Moreover, citizen suits provide a valuable avenue for public participation in environmental matters. A barometer for public sentiment and environmental concern, citizen suits help states focus their regulatory aims. And they provide an important opportunity for cooperation and communication among citizens, the regulated community, and government.

The Amici States' interest in preserving the effectiveness of citizen suits as a tool for protecting the environmental, health, and safety interests of their citizens will be directly affected by the decision in this case.

SUMMARY OF ARGUMENT

Standing and mootness are both aspects of justiciability. Though closely related, standing and mootness are applied using distinct principles. Standing evaluates a party's fitness to proceed at the outset of a case. Mootness, in contrast, examines the impact of subsequent events on a pending action. The impact on justiciability caused by subsequent events, including post-complaint compliance, should be evaluated on mootness rather than standing grounds. Because the issue before the court of appeals was created by post-complaint compliance, it was a question of mootness. But the court of appeals erroneously used a standing analysis to decide it.

Post-complaint compliance does not moot a citizen suit because the violator is "free to return to his old ways." Moreover, the ability of petitioner to demand and the district court's power to award civil penalties in a citizen suit is not dependant on whether injunctive relief is appropriate. Even if post-complaint compliance makes injunctive relief inappropriate, civil penalties can redress a citizen's injuries. Civil penalties provide an incentive for defendants to cure

violations and prevent further pollution. Deterrence benefits the affected waters by enhancing environmental protection and reducing pollution. Because the petitioners have a special interest in the affected waters, their injury is redressed by the enhanced environmental protection flowing from the deterrent effect generated by civil penalties. Consequently, civil penalties can redress the petitioners' injury.

I. THE COURT OF APPEALS MISTAKENLY APPLIED STANDING PRINCIPLES TO DECIDE A MOOTNESS QUESTION

The court of appeals did not question whether petitioners had standing. The court nonetheless found that dismissal was compelled by *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998) -- a standing decision. Yet it largely ignored *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987) -- which discussed mootness in circumstances like those here. The court of appeals thus misapplied the separate but related doctrines of standing and mootness. This Court should clarify the distinction and reiterate the heavy burden borne by a defendant that asserts mootness based on its own actions.

1. Standing and mootness are closely related, overlapping aspects of justiciability. *See Allen v. Wright*, 468 U.S. 737, 750 (1984) ("'All of the doctrines that cluster about Article III -- not only standing but mootness, ripeness, political question, and the like -- relate in part, and in different though overlapping ways, to an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government.'", quoting *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1178-1179 (D.C. Cir. 1983) (Bork, J., concurring)). *See also Warth v. Seldin*, 422 U.S. 490, 499 n.10 (1975)

("The standing question thus bears close affinity to questions of ripeness . . . and of mootness"); *Flast v. Cohen*, 392 U.S. 83, 99 (1968) ("standing 'serves, on occasion, as a shorthand expression for all the various elements of justiciability'", quoting Lewis, *Constitutional Rights and the Misuse of "Standing"*, 14 STAN. L. REV. 433, 453 (1962)). The constitutional dimension of mootness derives from the requirement that an Article III "case or controversy" persist throughout the litigation. *Deakins v. Monaghan*, 484 U.S. 193, 199 (1988); *Burke v. Barnes*, 479 U.S. 361, 363 (1987). The mootness doctrine requires that the parties maintain a "personal stake" in the outcome of the litigation, which, for the plaintiff, can be expressed in terms of the constitutional standing triad of actual injury, causation, and redressability. *Spencer v. Kemna*, 118 S.Ct. 978, 983 (1998). It is in this sense that mootness is said to be "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of litigation (standing) must continue throughout its existence (mootness)." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 (1997), quoting *United States Parole Commission v. Geraghty*, 445 U.S. 388, 397 (1980).

2. Though standing and mootness are related analytically, they are applied using distinct principles. Standing focuses on the fitness of the *party* invoking the courts; mootness focuses on whether *events* have altered the appropriateness of judicial intervention. *Compare Flast*, 392 U.S. at 99, *with Church of Scientology of California v. United States*, 506 U.S. 9, 12 (1992). The plaintiff bears the burden of establishing standing; the defendant who alleges that some event has made judicial intervention inappropriate bears the burden of establishing mootness. *Compare Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992), *with Cardinal Chemical Co. v. Morton International, Inc.*, 508 U.S. 83, 98 (1993).

The nature of the alleged mooting event -- whether it is due to the action of plaintiff, *Arizonans for Official English*, 520 U.S. at 67; *Deakins v. Monaghan*, 484 U.S. at 200 n. 4, or to the action of the defendant, *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953), or to some "independent" factor, *e.g.*, *Burke v. Barnes*, 479 U.S. at 363 (expiration of the bill by its own terms) -- significantly affects the burden borne by the defendant. When, as here, the alleged mooting event is the voluntary action of the defendant, "[t]he test for mootness . . is a stringent one": it must be "*absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur." *United States v. Concentrated Phospate Export Assn.*, 393 U.S. 199, 203 (1969) (emphasis added). Otherwise, the defendant would be "free to return to his old ways" after dismissal for mootness. *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953).[1]

3. Because of their analytical differences and distinct principles of application, mootness and standing are considered at different points in litigation. The Court generally has treated standing (like subject matter jurisdiction) as a threshold matter. The impact of subsequent events is then analyzed under the mootness doctrine rather than revisiting the initial standing decision. The plurality opinion in *Lujan* made this difference clear. It rejected the notion that subsequent events could supply a redressability element for standing that was lacking when the complaint was filed. *Lujan v. Defenders of Wildlife*, 504 U.S. at 570 n. 4. And it relied on subject matter jurisdiction -- which depends solely on the state of things at the time the action is filed -- as the

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1. The nature of the relief sought also affects the defendant's burden. When several forms of relief are sought, each must be examined for mootness independently. The mootness of equitable claims does not necessarily moot any damage claims. *Deakins*, 484 U.S. at 201; *Powell v. McCormack*, 395 U.S. 486, 497-500 (1969).

model for standing. *See* 504 U.S. at 569 n. 4. *See also Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. at 69 (Scalia, J., concurring). The many decisions holding that plaintiffs had standing when the complaint was filed but that their claims subsequently became moot, like *County of Riverside v. McLaughlin*, 500 U.S. 44, 51 (1991), fit the model of assessing standing as a threshold matter and then evaluating the impact of subsequent events under the mootness doctrine.

4. The court of appeals decision ignored that model; it instead used a standing analysis to answer a mootness question. The court relied on *Steel Co. v. Citizens for a Better Environment* -- an initial standing case -- to analyze the mootness effect of events subsequent to the filing of the suit. The complainant in *Steel Co.* alleged only past violations of environmental information reporting requirements. 523 U.S. 83 at 1008. The Court held that the civil penalties sought would not redress plaintiff's injury from past reporting violations because: (1) civil penalties payable to the Treasury would not remedy the injury suffered, 523 U.S. 83 at 1018; and (2) injunctive relief would not remedy past violations, 523 U.S. 83 at 1019. Unfortunately for the plaintiff, while injunctive relief would remedy future violations by deterring them, plaintiff had not alleged either a continuing or a future violation. *See* 523 U.S. 83 at 1019. Here, in contrast, there is no question that petitioners had standing, and therefore satisfied redressability requirements, when they filed suit. Petitioners had standing based on their allegations of continuing violations of National Pollutant Discharge Elimination System (NPDES) discharge requirements, which, consistent with *Steel Co.*, could be redressed by injunctive relief and civil penalties.

The question here is not one of standing. It is whether subsequent voluntary compliance by respondent moots the

claims that petitioners had standing to raise at the time they filed the complaint. *Steel Co.* does not answer that question. But *Gwaltney of Smithfield. v. Chesapeake Bay Foundation,* does, albeit in dicta.

The complaint in *Gwaltney*, like the complaint here, included allegations that the NPDES discharger had violated and was continuing to violate NPDES requirements. *See* 484 U.S. at 54. The complaint sought declaratory and injunctive relief, and civil penalties. The discharger in *Gwaltney* claimed that it had ceased violating the law before plaintiffs filed suit, and that because the CWA citizen suit provision only authorized suits for ongoing, not wholly past violations, the courts lacked jurisdiction over the case. This Court held that a citizen could seek civil penalties only in conjunction with ongoing, not wholly past violations. 484 U.S. at 57.

Significantly, the discharger in *Gwaltney* also argued that if the allegations of ongoing violation became false after citizens filed suit, *i.e.*, if the discharger subsequently complied with NPDES requirements, then pursuit of the citizen suit would contravene the Article III "case or controversy" requirement. 484 U.S. at 66. The Court said if that occurred, *i.e.*, if there was post-complaint compliance, the matter would be analyzed under the mootness doctrine using the stringent standard for voluntary cessation of illegality by the defendant. *See* 484 U.S. at 66-67. *Supra* at 5.

Consequently, *Gwaltney* shows that if allegations of ongoing NPDES violations are sufficient to find standing when a complaint is filed, subsequent post-complaint compliance does not trigger reevaluation of the initial standing decision. Instead, *Gwaltney* calls for application of the mootness standard for voluntary cessation of illegality by the defendant. There is nothing in *Steel Co.* questioning this

mode of analysis in *Gwaltney*. In fact, in *Steel Co.* the Court treated *Gwaltney* as a case where "Article III standing was . . . found," 523 U.S. 83 at 1011 -- confirming that post-complaint compliance does not eliminate Article III standing that existed at the time suit is filed.[2]

5. Replacing mootness with standing concepts to analyze post-complaint compliance would eliminate the salutary flexibility in mootness doctrine. For example, the "personal stake" aspect of mootness is of no less constitutional dimension or origin than injury-in-fact or redressability for standing. Yet the Court has shown more flexibility in considering mootness than in considering standing. Thus it has recognized exceptions for mootness of disputes "capable of repetition, yet evading review," *Honig v. Doe*, 484 U.S. 305, 318 (1988), and for adjudication of class action issues despite the mootness of the class representatives' claims, *see United States Parole Commission v. Geraghty*, 445 U.S. 388. The Court has expressly acknowledged the "flexible

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2. The court of appeals' reliance on *Steel Co.* is misplaced for another reason. The complaint in *Steel Co.* was brought under the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA), 100 Stat. 1755, 42 U.S.C. § 11001-11050. This suit was brought under the Clean Water Act's citizen suit provision. Unlike the CWA, the EPCRA does not establish liability for discharges that exceed permit limitations like the Clean Water Act. Instead, it is a regulatory scheme that requires strict adherence to reporting functions. Violations under EPCRA are similar to CWA violations for failure to submit a discharge monitoring report -- violations of only one part of the scheme. The distinction between reporting requirements and permit violations is significant.' A regulated party often can substantially comply with reporting obligations simply by filing a late report. Indeed, that is how the defendant avoided the citizen suit in *Steel Co.* 523 U.S. 83 at 1009. By contrast, neither logic nor law supports the premise that a regulated party that made an illegal discharge can avoid liability by improving the quality of the partially treated waste water that has left its treatment facilities.

character" of Article III mootness, *id.* at 400, which calls for sensitivity to "*practicalities* and *prudential considerations*" rather than a "strict formalistic view of Art. III jurisprudence." *Id.* at 404 (emphasis added). *See also Honig*, 484 U.S. at 331 (Rehnquist, C.J., concurring) ("The logical conclusion to be drawn from these cases, and from the historical development of the principle of mootness, is that while an unwillingness to decide moot cases may be connected to the case or controversy requirement of Art. III, it is an attenuated connection that may be overridden where there are strong reasons to override it.").

Relying on formalistic standing requirements is particularly inappropriate in this case, where the separation of powers concerns underlying some standing requirements are absent. This is not a suit against the government with some risk that the courts will be drawn into judicial resolution of "general grievances" "pervasively shared and most appropriately addressed in the representative branches." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 475 (1982). It is a suit by one private party against another. Indeed, any separation of powers concerns cut the other way. The judicial branch should be sensitive to Congressional power to define not only "injuries and . . chains of causation that will give rise to a case or controversy where none existed before," *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring), but also to *statutory remedies* for those injuries and chains of causation. It is the continued viability of such a statutory remedy that is the very issue in this case.

II. PETITIONERS' REQUEST FOR CIVIL PENALTIES DID NOT BECOME MOOT SIMPLY BECAUSE THE COURT DENIED INJUNCTIVE RELIEF

Applying mootness rather than standing concepts in deciding this case, the proper inquiry is not whether civil penalties "redress" petitioners' injury. Instead the court must decide whether it was "impossible for the court to grant to petitioners 'any effectual relief whatever,'" *Church of Scientology*, 506 U.S. at 12, *quoting Mills v. Green*, 159 U.S. 651, 653 (1895), once respondent ceased its violations and injunctive relief was no longer in issue. A case in which the relief sought is limited to civil penalties is not moot under this standard for at least two reasons.

First, monetary and damage claims are not usually moot even if injunctive relief becomes unavailable. *See, e.g.*, *Powell v. McCormack*, 395 U.S. 486, 498 (1969). That conclusion is unchanged by the ruling in *Gwaltney* that the citizen suit provision has a "prospective orientation." 484 U.S. at 59. The *Gwaltney* ruling is, as the Court indicated in *Steel Co.*, more properly understood as a ruling on the scope of the "cause of action" created under the CWA for citizens. *See Steel Co.*, 523 U.S. 83 at 1010-1011.

The "cause of action" concept is distinguishable from "standing" and "relief." *See Davis v. Passman*, 442 U.S. 228, 239-240 n.18 (1979).[3] "A plaintiff may have a *cause of action* even though he be entitled to *no relief*, as, for example

3. "Standing" refers to "whether a plaintiff is sufficiently adversary to a defendant to create an Art. III case or controversy". *Davis v. Passman*, 442 U.S. at 239-240, n. 18. A "cause of action" defines the particular "class of litigants that may, as a matter of law, appropriately invoke the power of the court." *Id.* at 240, n. 8. "Relief" is simply "a question of the various remedies a federal court may make available." *Id.*

when a plaintiff sues for declaratory or injunctive relief although his case does not fill the 'preconditions' for such equitable remedies." *Id.* at 240 n. 8. Similarly, injunctive relief may be denied even though an action might not be moot. *See United States v. W.T. Grant Co.*, 345 U.S. at 635-636.

Here, there is no question that petitioners' complaint alleged a valid cause of action under *Gwaltney*, *i.e.*, that petitioners alleged continuing rather than wholly past violations of the CWA. Petitioners' complaint sought declaratory and injunctive relief and civil penalties. The subsequent unavailability of one of those remedies -- injunctive relief -- cannot change the fact that petitioners stated in their complaint a viable "cause of action" that was fully in accord with *Gwaltney*, and that civil penalties remain a viable remedy under that cause of action.

Moreover, weighty practical considerations militate against the mootness of civil penalties in these circumstances. The rule adopted by the court of appeals permits defendants to wait until trial or appeal before complying with the CWA. The rule then allows them to completely escape civil penalties because of the belated elimination of "redressability." If that is true, then (a) no defendant has any incentive to comply with the CWA until the very last stages of litigation, and (b) citizens will be unlikely to even seek civil penalties because defendants can always escape penalties at the last minute. The practical effect of such a mootness rule would be to largely eliminate citizen suits for civil penalties. Congress, however, expressly authorized citizens to seek civil penalties. *See* 33 U.S.C. § 1365(a) ("district courts shall have jurisdiction . . . to apply any appropriate civil penalties under § 1319(d)"); S.Rep. No. 414, 92nd Cong., 2nd Sess. 1972, *reprinted in* 1972 U.S.C.C.A.N. 3745 (courts may "impose civil penalties . . . as a result of actions brought by citizens"). Because

practical considerations rightfully play a role in mootness doctrine, *see Honig v. Doe*, 484 U.S. at 330 (Rehnquist, C.J., concurring) (noting the "obvious pragmatic considerations" underlying the mootness exception for disputes "capable of repetition yet evading review"), the practical impact of the court of appeals' mootness rule strongly counsels against its adoption.

III. PETITIONERS' COGNIZABLE INJURY IS REDRESSED BY CIVIL PENALTIES

The court of appeals concluded that civil penalties will not redress petitioners' injury because the penalties go to the United States Treasury, not to petitioners, and therefore, the penalties do not "benefit" petitioners. *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 149 F.3d 303, 306-07 (4th Cir. 1998). The court failed to appreciate the deterrent effect of civil penalties and the resulting benefits to the environment, environmental protection, and citizen suitors.

1. Civil penalties play a vital role in protecting the Nation's waters. Basically, penalties give defendants an incentive to cure violations and prevent further pollution. They also deter future violations.

Most importantly, the CWA specifically provides that the amount of penalties will be based, in part, on "the economic benefit (if any) resulting from the violation." 33 U.S.C. § 1319(d). Accordingly, penalties offset the economic benefits that a defendant might obtain by continuing its CWA violations after a plaintiff has filed a citizen suit. Civil penalties also are mandatory: violators "*shall* be subject to" civil penalties. 33 U.S.C. § 1319(d) (emphasis added). Penalties are certain, and by disgorging any resulting economic benefit, penalties are more than a cost of doing

business.. *See United States v. Municipal Auth. of Union Township*, 150 F.3d 259, 264 (3d Cir. 1998) (economic benefit analysis is used "to level the economic playing field and prevent violators from gaining an unfair competitive advantage.")

Mandatory civil penalties also work hand-in-hand with the 60 day notice provision of the CWA. The notice requirement gives violators a 60 day window of opportunity to remedy their violations free of any economic sanctions. An enlightened violator will take advantage of this opportunity. The affected waters will benefit, and so will the plaintiffs, who have a special interest in those waters. Unenlightened violators will learn their lesson the hard way; after a citizen suit has been filed, mandatory civil penalties will deprive those violators of any economic benefits from further noncompliance. Those penalties also specifically deter future violations of the CWA by the named defendant. Thus, civil penalties play a powerful remedial role both in stopping *ongoing* violations as soon as possible, and in deterring *future* ones by the defendant.

2. Contrary to the court of appeals' conclusion, civil penalties would benefit petitioners and redress their injury consistent with the "prospective orientation," *Gwaltney*, 484 U.S. at 59, of citizen suits. Petitioners' injury stems from ongoing violations of NPDES discharge permits. Civil penalties help stop those ongoing violations as soon as possible. An injunction may stop the violation, but standing alone it creates no real incentive for speedy compliance. The prospect of paying substantial civil penalties, on the other hand, can change a polluter's offending behavior.

Citizens filing CWA suits, whether the petitioners here or the Amici States elsewhere, are not indifferent as to the timing of compliance. They have a direct and powerful

interest, as users of the polluted waterway, in stopping violations as soon as possible. They are adversely affected by delays in compliance. The incentive for prompt compliance created by the threat of civil penalties defies the notion that civil penalties merely serve to redress wholly past, or speculative future injury. Civil penalties play a crucial role in halting ongoing violations as soon as possible -- a role that directly "benefits" plaintiffs, remedies their injury, and is fully consistent with *Gwaltney's* prospective focus.[4]

3. The court of appeals' rationale defeats all citizen suit claims for civil penalties, not just those where the district court has denied injunctive relief. Penalties always go to the Treasury. Citizens' suits would be brought to an abrupt end, no matter how egregious the circumstances, by a holding that the failure of Congress to direct civil penalties to the plaintiff's bank account is a sufficient basis to defeat a citizen suit. Congress clearly envisioned a different result: it provided for civil penalties *and* injunctive relief in citizen suits, not merely injunctive relief. 33 U.S.C § 1365. The court of appeals read the citizen suit provision as though Congress never even mentioned civil penalties.

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4. To say that civil penalties only redress *past* violations misunderstands the nature and dynamics of deterrence. Deterrence is based on credible threats. A threat of punishment made in an effort to change someone's behavior is only credible if the punishment is carried out later if the behavior does not change. In this case, if civil penalties cannot be imposed for respondent's "past," *i.e.*, post-complaint, violations, then civil penalties can never be a credible threat and will not have a coercive effect on polluter's behavior and ongoing post-complaint violations. In short, imposition of civil penalties for past violations is essential to, and inextricably linked with, deterring the continuation of earlier violations. In short, civil penalties deter, and deterrence enhances environmental protection. This in turn benefits a citizen suitor because that person has a special interest in the affected waters.

This approach is tantamount to saying that some form of "bounty" or *qui tam* provision is a constitutional prerequisite for Congress to authorize citizens to collect civil penalties for the government. Yet long ago the Court upheld a state statute authorizing private parties to sue for penalties that went exclusively to a local government, and the Court expressed no concern about any standing defects in such a statutory scheme. *See Lake Shore & Michigan Southern Railway Co. v. Ohio*, 173 U.S. 285, 286 (1899).

Certainly, under this statutory scheme, the federal government does not have to prove injury to its own interests in order to collect CWA civil penalties; nor must it use such penalties to remediate the polluted waterway. It follows that civil penalties do not have any *compensation* or *remediation* purpose; their sole purpose is deterrence. Where the money goes -- be it to the Treasury or elsewhere -- is irrelevant. So long as the violator pays the penalty, the deterrence purpose is achieved. The court of appeals' focus on where the money goes in analyzing the "benefit" to petitioners misperceived and underestimated the deterrent value of penalties.

4. These petitioners are interested in an award of civil penalties even though it goes to the Treasury because they personally benefit from the deterrent effects of the penalties. Their special interest in the affected waters makes their interest in the penalties more than a "generalized" one. And this interest, despite its complexity, is very real.

The court of appeals declared that civil penalties would merely provide petitioners "psychic satisfaction" in seeing the laws enforced and wrongdoers punished, and that the case, consequently, fell into the category of "generalized grievances" where standing is lacking. *Friends*, 149 F.3d at 306, *quoting Steel Co.*, 118 S.Ct. at 1019. Regardless of whether that might be true elsewhere, it is not true here.

This Court has explained that "generalized grievance" cases are those where

> the harm at issue is *not only widely shared*, but is also of an *abstract* and *indefinite* nature -- for example, harm to the 'common concern for obedience to law' [citations omitted]. The abstract nature of the harm -- for example, injury to the interest in seeing that the law is obeyed -- deprives the case of . . . concrete specificity . . . [and] prevents a plaintiff from obtaining what would, in effect, amount to an advisory opinion.

Federal Election Commission v. Akins, 118 S.Ct. 1777, 1785-1786 (1998) (emphasis added). Here, petitioners are not pursuing an abstract and indefinite injury like general obedience to the law. They have suffered special injury to their use of a particular waterway, something that distinguishes them from the general public. Neither of the two characteristics of a "generalized grievance," namely, "widely shared" and "abstract and indefinite" injury, are present in this case. Perhaps other members of the public may benefit indirectly from imposition of penalties against this defendant by virtue of an *in terrorum* effect against other future violators. But that does not undermine petitioners' standing. "[T]he general public interest" can always buttress one's standing. *Warth v. Seldin*, 422 U.S. at 501.

Furthermore, this case is not like cases where standing was lacking because redressability depended on the intervening response or actions of third parties, such as *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973). Here, the penalties act directly and immediately on respondent -- the very party whose behavior is causing the injury to petitioners. Moreover, the Court has upheld indirect patterns of redressability even when redressability depended on the actions of a third party. *See Franklin v. Massachusetts*, 505

U.S. 788, 801-803 (1992) (redressability where declaratory relief action against Secretary was likely to result in compliance by the President); *Bennett v. Spear*, 520 U.S. 154, 168-170 (1997) (redressability in suit challenging biological opinion by U.S. Fish and Wildlife Service even though Bureau of Reclamation was not technically bound by the biological opinion, and the actions causing injury were those of the Bureau); *cf. Akins*, 118 S.Ct. at 1786-1787 (redressability in overturning discretionary prosecutorial decision even though agency might make the same decision not to prosecute later on different grounds). If "indirect" forms of redressability were sufficient in these cases, then *a fortiori*, the linkage between civil penalties and deterrence of ongoing violations establishes sufficient redressability for standing in this case.

CONCLUSION

Subsequent events neither destroyed petitioners' standing nor mooted their claim for civil penalties. Accordingly, this court should reverse and remand with instructions to decide the petitioners' appeal on the merits.

Dated: May 17, 1999

Respectfully submitted,

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(18)

Supreme Court, U.S.
FILED
JUL 15 1999
OFFICE OF THE CLERK

No. 98-822

In the

Supreme Court of the United States

FRIENDS OF THE EARTH, *et al.*,
Petitioners,

v.

LAIDLAW ENVIRONMENTAL SERVICES (TOC), INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND STATE OF CALIFORNIA AUTO DISMANTLERS ASSOCIATION IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether private plaintiffs' action became moot on appeal, due to redressability, where the only potential relief available was civil penalties to the United States Treasury.

2. Whether private plaintiffs are entitled to recovery of attorneys' fees or other litigation costs when they are not the prevailing or substantially prevailing party.

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IDENTITY AND INTERESTS OF AMICI CURIAE

Pursuant to Supreme Court Rule 37.2, Pacific Legal Foundation and the State of California Auto Dismantlers Association respectfully submit this brief amicus curiae in support of Respondent, Laidlaw Environmental Services (TOC), Inc.[1] Written consent was granted by counsel for all parties and lodged with the Clerk of this Court.

Pacific Legal Foundation (PLF) is the largest and most experienced nonprofit public interest law foundation of its kind in America. PLF was founded in 1973 and provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedoms, and free enterprise. PLF litigates nationwide in state and federal courts with the support of thousands of citizens from coast to coast. PLF is headquartered in Sacramento, California, and has offices in Miami, Florida; Honolulu, Hawaii; Bellevue, Washington; and a liaison office in Anchorage, Alaska.

In its fight to protect fundamental constitutional rights, PLF becomes involved in cases that raise important public policy considerations that may create significant legal precedents. Amicus participation is approved by a voluntary Board of Trustees where PLF's perspective will assist the court in resolving the underlying legal issues. PLF supports a broad view of the public interest and promotes balance and common sense in the adoption, interpretation, and administration of laws and regulations.

PLF has a long-standing interest in environmental issues and has participated in this Court in numerous cases involving the interpretation of federal laws. For example, PLF was amicus

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[1] Pursuant to Supreme Court Rule 37.6, Amici Curiae affirm that no counsel for any party in this case authored this brief in whole or in part; and, furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

curiae in this Court in *Steel Company v. Citizens for a Better Environment*, 118 S. Ct. 1003 (1998); *Bennett v. Spear*, 520 U.S. 154 (1997); *Douglas County, Oregon v. Babbitt*, 516 U.S. 1042 (1996); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995); and *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

The State of California Auto Dismantlers Association (Association) is a nonprofit organization with approximately 650 members and represents the interests of the 1,400 licensed auto dismantlers in the State of California. Licensed facilities are the only entities authorized to dismantle and salvage vehicles for the recovery and recycling of parts and metals and for properly disposing of the 300 pounds of toxins and hazardous materials in the typical vehicle.

In addition to its lobbying efforts, the Association provides services and training. Business and regulatory information is provided by the Association at conferences and through various publications. For example, the Association has put together an industry guide for complying with the storm water regulations under the Clean Water Act. For several years, the industry has worked hard to ensure compliance with the many environmental regulations that govern these licensed facilities. The industry's compliance with the state's general storm water permit is well documented.

However, these largely family-owned businesses have recently been targeted by environmental activists with threats of litigation for supposed infractions under the Clean Water Act. These activists have sent California auto dismantlers scores of Notices of Intent to Sue. These notices have cost the industry huge sums in legal fees and cash settlements.

The Notices of Intent to Sue inform industry members that they are in violation of the Clean Water Act and have 60 days to comply. Such notices typically result in settlements with the

environmental group for approximately $50,000 and few, if any, onsite environmental issues are addressed. The mere threat of taking a small business to federal court compels the business owner in most cases to seek a monetary settlement with the potential plaintiff.

The allegations in these notices are often vague to the point of unintelligibility. "Evidence" of failure to comply typically entails a mere picture of a puddle in the facility parking lot with an oil sheen on the top. Allegations of harm include claims that there "may be" fewer birds in the area of the facility than elsewhere and that boaters (miles away from the inland facility) have gotten oil on their hands while untangling a propeller on their boat. The notices usually make no attempt to connect the alleged violations to the alleged harms. And while many of these cases could never survive in court, the cost to defend against such accusations is more than the industry or a small family-owned business can support. In some cases, these notices have resulted in the virtual confiscation of the business and even the personal assets of some individuals.

Therefore, the Association has a direct interest in this case that puts at issue the scope of citizen suits under the Clean Water Act. The Association, along with PLF's public policy perspective and litigation experience in support of rational environmental protection and economic rights, will provide a necessary viewpoint on the issues presented in this case.

INTRODUCTION

In crafting the citizen suit provision of environmental laws, this Court has found that Congress sought to "strike a balance between encouraging citizen enforcement of environmental regulations and avoiding burdening the federal courts with excessive numbers of citizen suits." *Hallstrom v. Tillamook County*, 493 U.S. 20, 29 (1989). This Court has also found that

Congress intended citizen suits to "supplement rather than supplant governmental action." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*, 484 U.S. 49, 60 (1987). However, cases like the present case, that seek exorbitant civil penalties for good faith compliance efforts that result in technical violations that cause no harm to the environment, frustrate this congressional policy and unsettle the delicate balance Congress sought. Moreover, as illustrated in the Identity and Interests of Amici Curiae above, the citizen suit is becoming more and more the weapon of choice for activists bent on extorting lucrative money settlements from unsophisticated, small business owners on threat of litigation in federal court. This was never the intent of citizen suits, nor is it good public policy. Citizen suits are an aid to government enforcement. They are not an end in themselves. To stem such abuses, this Court should enforce the rule of law and hold environmental citizen-plaintiffs to the same strict constitutional standing and mootness standards that apply to other private litigants.

STATEMENT OF THE CASE

Laidlaw Environmental Services, Inc. (Laidlaw), owned and operated a hazardous waste incinerator in Roebuck, South Carolina. Waste water was produced by the air pollution control equipment attached to the incinerator. This waste water contained toxic metals and was treated onsite before discharge into the North Tyger River pursuant to a National Pollutant Discharge Elimination System (NPDES) permit issued by the State of South Carolina. Although Laidlaw tried a number of state-of-the-art treatment technologies approved by the state, Laidlaw was unable to meet the discharge limits established in the permit for mercury constituents. This resulted in recurring violations of the NPDES permit for a number of years. In May, 1992, the state filed an enforcement action against Laidlaw. On June 10, 1992, a state court approved a settlement of the suit whereby Laidlaw agreed to pay a $100,000 fine and meet all

discharge standards. By August, 1992, Laidlaw had innovated a technical fix to the discharge problem. Notwithstanding the court-approved settlement, on June 12, 1992, a number of environmental groups sued Laidlaw in federal court under the citizen suit provision of the Clean Water Act, seeking declaratory and injunctive relief, additional penalties, costs, and attorneys' fees.

In a 1997 decision, the United States District Court for the District of South Carolina held that Laidlaw had acted in good faith in addressing its discharge problems and that its discharge exceedences had not caused any harm to the environment because the permit limits had been set artificially low by the state. Nevertheless, the court held that Laidlaw had violated the permit's reporting, monitoring, and discharge standards and was subject to an additional penalty of $405,800. The court did not grant injunctive or declaratory relief to the plaintiffs because of the lack of demonstrated harm and the fact that Laidlaw was then in substantial compliance with its permit and had been for several years.

The plaintiffs appealed, arguing the district court had assessed an inadequate penalty. Laidlaw cross-appealed claiming that plaintiffs lacked standing to bring the suit because they suffered no injury in fact. Relying on the intervening United States Supreme Court decision in *Steel Company v. Citizens for a Better Environment*, 118 S. Ct. 1003, the Fourth Circuit held the case was moot because a civil penalty paid to the United States Treasury would not redress any injury plaintiffs may have suffered.

SUMMARY OF THE ARGUMENT

Petitioners argue that *Steel Company v. Citizens for a Better Environment* does not apply because in this case, and contrary to *Steel Company*, Petitioners allege ongoing or future

violations. But this argument mistakes the holding in *Steel Company* and is insufficient to resuscitate Petitioners' now defunct case.

The Court held in *Steel Company* that the remedial purposes of Article III can be satisfied by claims of future harm, but only if the harm is continuing or a future violation is imminent. Petitioners cannot make such claims in this case because the cited facility has been permanently closed and the offending waste treatment incinerator has been dismantled. This assures there will be no risk of future violations.

Petitioners also argue that *Steel Company* is inapposite because that case is a standing case whereas the present case is a mootness case. Petitioners are wrong. *Steel Company* is very much applicable to the present case.

The district court in this case found that Laidlaw had been in substantial compliance with its waste water discharge permit for an "extended period of time," since at least August, 1992, preceding not only the time of decision but also the time of trial. In fact, Laidlaw was in substantial compliance before the suit was brought and never caused actual harm to the environment. Based on the lack of demonstrated harm to the environment and future risk of harm, the district court denied Petitioners' prayer for both injunctive and declaratory relief. Petitioners never appealed those denials. If follows, therefore, that the Fourth Circuit could have found under *Steel Company* that Petitioners lacked standing. The fact that the court chose to declare the case moot instead, relying on the rationale of *Steel Company*, does not preclude this Court from finding a lack of standing now.

Moreover, under this Court's precedent, the requirements for standing and mootness are essentially the same. The elements of standing must continue to exist at every stage of litigation, not just at the time of the complaint. Therefore, this Court's Article III analysis in *Steel Company* is equally

applicable to the present case and justifies a determination that the case is moot.

Finally, Petitioners argue that *Gwaltney*, 484 U.S. 49, is controlling in this case and not *Steel Company*. They claim that *Gwaltney* is essentially identical on the facts to the present case and this Court implicitly found *Gwaltney* was not moot. However, the Court did not so find. To the contrary, the Court suggested the mootness doctrine would come into play to stop a case like the present case where the defendant has come into compliance during the course of litigation: "Longstanding principles of mootness, however, prevent the maintenance of suit when 'there is no reasonable expectation that the wrong will be repeated.'"

ARGUMENT

I

PUTTING THINGS IN PERSPECTIVE: PETITIONERS HAVE NOT DEMONSTRATED AN IMMINENT THREAT OR ONGOING VIOLATION

Petitioners claim the Fourth Circuit's reliance on *Steel Company v. Citizens for a Better Environment*, 118 S. Ct. 1003, is misplaced because in this case, contrary to *Steel Company*, there is a risk of continuing or future violations under the Clean Water Act. This argument is central to Petitioners' position that their case is not moot and should not be dismissed. However, Petitioners utterly fail to demonstrate the immediacy of such threats.

In the *Steel Company* case, Citizens for a Better Environment (CBE) sent a 60-day Notice of Intent to Sue to The Steel Company alleging the company had not filed certain chemical inventory and release forms required under Sections 312 and 313 of the Emergency Preparedness and Community Right-to-Know Act (EPCRA) of 1986. Before the 60-day notice period had run, The Steel Company filed the

forms with the Environmental Protection Agency (EPA). EPA chose not to pursue an enforcement action but, notwithstanding the *Steel Company* filing, CBE commenced a suit in the Northern District Court of Illinois. The Steel Company filed a motion to dismiss, contending that because the company was in compliance when the complaint was filed, the court had no jurisdiction to hear a case for a present violation, and EPCRA did not authorize citizen suits for wholly past violations. The district court agreed, but the court of appeals reversed, concluding that citizens may seek civil penalties against EPCRA violators who file after the statutory deadline and after receiving notice of intent to sue. This Court granted certiorari and held that plaintiffs did not have Article III standing.

The gravaman of that decision was that the plaintiffs lacked the third requirement of the "irreducible constitutional minimum of standing"—redressability, a likelihood that the requested relief will redress the alleged injury. *Id.* at 1016-17. This Court noted that none of the specified items of relief sought, and none that could be envisioned as "appropriate," would serve to recompense plaintiffs for their alleged harm.

As to civil penalties—the only relief sought by Petitioners on appeal against Laidlaw in the present case—this Court stated:

> [T]he civil penalties authorized by the statute . . . might be viewed as a sort of compensation or redress to respondent if they were payable to respondent. But they are not. These penalties—the only damages authorized by EPCRA—are payable to the United States Treasury. In requesting them, therefore, respondent seeks not remediation of its own injury—reimbursement for the costs it incurred as a result of the late filing—but vindication of the rule of law—the "undifferentiated public interest" in faithful execution of EPCRA. . . . This does not suffice.

Id. at 1018.

After dismissing the claim for civil penalties as a basis for establishing Article III standing, this Court then examined the plaintiffs's request for injunctive relief. This Court observed that injunctive relief "cannot conceivably remedy any past wrong but is aimed at deterring petitioner from violating EPCRA in the future." *Id.* at 1019. However, the Court noted that objective can satisfy Article III's remedial purposes when threatened injury is a basis for the complaint. "If respondent had alleged a continuing violation or the imminence of a future violation, the injunctive relief requested would remedy that alleged harm." *Id.* But the Court concluded there was no such allegation in that case and, on the facts of that case, there appeared no basis for it. *Id.* So it is in the present case. There is no basis for alleging a continuing or imminent future violation.

From the time the complaint was filed and its January, 1997, opinion, the district court found there had been only one monitoring violation and no reporting violations. *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 956 F. Supp. 588, 609 (D.S.C. 1997). In fact, the district court found Laidlaw had been in substantial compliance since two months after the complaint was filed and years before any trial. The court even laid some blame for delayed technical compliance at the feet of petitioners.

> In this case, Laidlaw has been in substantial compliance with all parameters in its NPDES permit since at least August 1992. This includes mercury, all other metals, temperature, pH and all monitoring and reporting obligations. In fact, Laidlaw has been in compliance with the vast majority of its permit requirements for a much longer period of time,

> extending back to March 1991 when the Lancy system was installed. The only mercury violations in 1994 and 1995 were at the levels of 2.7 ppb and 1.6 ppb, respectively, and these would not have been permit exceedences at all had not plaintiffs by their appeal stayed the effective date of Laidlaw's new NPDES permit containing a daily maximum limit for mercury of 10 ppb.

Id. at 611.

Based on the lack of demonstrated harm to the environment, and the fact that Laidlaw was in compliance at the time of the court's decision and had been for an extended period of time, the district court felt compelled to deny the plaintiffs' request for injunctive relief. *Id.* Petitioners did not appeal this denial. Nevertheless, Petitioners doggedly maintain their case is different from *Steel Company* because they have alleged a threat of future violations. But even if Petitioners' failure to appeal the denial of an injunction were not enough to preclude Petitioners' argument from consideration by this Court, Petitioners' allegations of future harm do not satisfy this Court's requirement that the anticipated violation must be either ongoing or imminent.

As a factual matter, there is no *ongoing* threat of harm to the environment or a risk of an *imminent* violation. As the district court found, Laidlaw has been in compliance or substantial compliance with its NPDES permit for years. For this reason, Petitioners were unable to demonstrate in the trial court that they would suffer irreparable injury if injunctive relief were not granted.

> Injunctive relief is not appropriate where the defendant is in compliance or in substantial compliance with the Clean Water Act, *PIRG v. Yates Industries*, 757 F. Supp. 438 (D.N.J. 1991); *citing Weinberger v. Romero-Barcelo*, 456 U.S. 305, 102 S. Ct. 1798, 72 L. Ed. 2d 91 (1982), and a defendant in substantial compliance with its NPDES permit is not required to show that there is no chance of a future permit violation in order to defeat a request for injunctive relief. *Atlantic States Legal Foundation, Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128 (11th Cir. 1990).

Id.

Not only has Laidlaw been in compliance for an extended period of time, but it can now guarantee compliance in the immediate future because the company has ceased operation of the permitted facility and has dismantled the offending waste incinerator. *See* Respondents' Suggestion for Mootness.

But these facts do not deter Petitioners. They unabashedly claim a threat of harm still looms because (1) Laidlaw still has a valid NPDES permit and "may discharge in the future whenever it cares to do so," (2) Laidlaw's retention of its permit indicates Laidlaw's intent to discharge, and (3) Laidlaw has NPDES permits at other facilities. Brief for Petitioners at 8 n.7. However, these allegations are not enough to resuscitate Petitioners' suit. The first two claims are speculative and fail to address the immediacy requirement for subsequent violations. The third claim is simply irrelevant to the present case. As this Court stated in *Steel Company*, such allegations must indicate an *ongoing* violation or an *imminent* future violation. *Steel Company*, 118 S. Ct. at 1019. But, on the facts of this case, there is no basis for such allegations.

II

THE STANDING RATIONALE OF *STEEL COMPANY* APPLIES TO THIS CASE

Besides their putative claims of future violations, there is another reason Petitioners offer to distinguish this case from *Steel Company*. They argue that *Steel Company* is a standing

case while this case is a mootness case. Therefore, Petitioners believe *Steel Company* has no relevance to this case. They are wrong.

The *Steel Company* case was decided after the district court decision in this case but before the decision of the Fourth Circuit. The Fourth Circuit relied entirely on *Steel Company* for its mootness determination. But the irony of this case is that the Fourth Circuit could have relied on *Steel Company* to find that Petitioners had no Article III standing. In fact, this case is a classic *Steel Company* standing case.

As noted in some detail above, the district court expressly found that Laidlaw had been in substantial compliance with its NPDES permit for an "extended period of time"—at least since August, 1992, two months after the complaint was filed in June, 1992—preceding not only the time of decision but also the time of trial. *See Friends*, 956 F. Supp. at 611. In fact, there was sufficient evidence to support a conclusion that Laidlaw was in substantial compliance even before the complaint was filed, thus negating Petitioners' standing claims.

For example, the court found that Laidlaw's monitoring and reporting deficiencies "produced no direct environmental impact." *Id.* at 602. Further, the court found that Laidlaw was in "good faith" compliance since March, 1991, when it installed a new treatment system. *Id.* at 599. And, the court determined the two mercury exceedences subsequent to the filing of the complaint should not have been actual violations because the 10 ppb daily maximum permit limit was set artificially high by the state and could have been set at 200 ppb but for Laidlaw's demonstrated ability to achieve a much lower limit. *Id.* at 609.

Based on these observations and the lack of demonstrated future harm to the environment, the district court denied Petitioners' request for both injunctive and declaratory relief. This left Petitioners only with a claim for civil penalties. And

such a claim, this Court decided in *Steel Company*, does not satisfy the redressability requirement of Article III standing.

The fact that the Fourth Circuit did not employ a direct application of *Steel Company* to the standing issue does not preclude this Court from doing so now. This case should have been decided on standing grounds and not on mootness grounds. *See Gwaltney*, 484 U.S. at 65-66. However, the distinction may be one of little difference. The Fourth Circuit correctly perceived that under this Court's precedent, the standards for mootness and standing are essentially the same.

> In order to have standing, a plaintiff must have suffered an actual or threatened injury in fact; the injury must have been caused by the defendant's complained-of conduct; and the injury must be redressable by the relief sought. *See Steel Company v. Citizens for a Better Env't*, — U.S. —, — - —, 118 S. Ct. 1003, 1016-17, 140 L. Ed. 2d 210 (1998). Moreover, these elements must continue to exist at every stage of review, not merely at the time of the filing of the complaint. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 117 S. Ct. 1055, 1068, 137 L. Ed. 2d 170 (1997); *Suarez Corp. Indus. v. McGraw*, 125 F.3d 222, 228 (4th Cir. 1997). Otherwise, the action becomes moot. *See United States Parole Com'n v. Geraghty*, 445 U.S. 388, 397, 100 S. Ct. 1202, 63 L. Ed. 2d 479 (1980) (explaining that mootness has been described as "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)."
>
> *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 149 F.3d 303, 306 (4th Cir. 1998).

It makes little difference, therefore, whether the lower court based its dismissal of this suit on mootness or standing—both are jurisdictional and the rationale expressed in *Steel Company* applies equally to both. At virtually no time did Petitioners qualify to litigate this case because their suit lacked the essential component of redressability. At the beginning as at the end, the only live claim they had was for civil penalties. Since these are paid into the United States Treasury and do not inure to the benefit of the plaintiffs, the imposition of penalties cannot recompense Petitioners for their alleged harm. Therefore, the case should be dismissed.

III

PETITIONERS RELIANCE ON *GWALTNEY* IS MISPLACED AS THAT CASE UNDERCUTS RATHER THAN SUPPORTS PETITIONERS' MOOTNESS ARGUMENT

Petitioners claim that *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, is controlling in this case and not *Steel Company*. If this is true, Petitioners still lose.

In *Gwaltney*, this Court considered whether the citizen suit provision in the Clean Water Act authorized citizen suits for wholly past violations. This Court determined the Act did not confer such jurisdiction citing, among other things, the forward-looking language, and the purpose of the citizen suit provision. That case turned on a question of statutory interpretation rather than mootness. Nevertheless, Petitioners claim that *Gwaltney* is like the present case and in *Gwaltney* the Court "implicitly, but clearly, held that the case was not moot." Petitioners' Brief at 17. Whatever petitioners infer from *Gwaltney*, the one thing that is clear is that the Court did not hold the case was not moot, either expressly or implicitly. To the contrary, the Court

suggested a case like the present would be declared moot to protect Article III principles.

According to the Court, the petitioner in *Gwaltney* expressed some worry that the Court's construction of the Clean Water Act

> would permit citizen-plaintiffs, if their allegations of ongoing noncompliance become false at some later point in the litigation because the defendant begins to comply with the Act, to continue nonetheless to press their suit to conclusion. According to petitioner, such a result would contravene both the prospective purpose of the citizen suit provisions and the 'case or controversy' requirement of Article III.

Id. at 386.

To assuage these worries, the Court stated that "[L]ongstanding principles of mootness, however, prevent the maintenance of suit when 'there is no reasonable expectation that the wrong will be repeated.'" *Id.* Thus, the Court envisioned a case like the present case and offered a resolution that undercuts rather than supports Petitioners' argument that their case is not moot and should not be dismissed.

Apparently, however, Petitioners are convinced that the mere allegation of ongoing or future violations is sufficient to overcome a mootness determination, even if the facts show there is no such threat. But, the Court in *Gwaltney* considered this question and came to the opposite conclusion.

According to the Court, allegations of ongoing or future violations may be defeated by a showing that it is "absolutely clear that the alleged wrongful behavior could not reasonably be expected to recur." *Gwaltney*, 484 U.S. at 67 (citing *United States v. Phosphate Export Association, Inc.*, 393 U.S. 199, 203 (1968). Respondent Laidlaw has met this burden. As noted

above, the Laidlaw facility has been permanently closed and the offending waste incinerator has been dismantled. There is no future risk of harm.

> Mootness doctrine thus protects defendants from the maintenance of suit under the Clean Water Act based solely on violations wholly unconnected to any present or future wrongdoing, while it also protects plaintiffs from defendants who seek to evade sanction by predictable "protestations of repentance and reform." *United States v. Oregon State Medical Society*, 343 U.S. 326, 333 (1952).

Id. at 66-67.

CONCLUSION

This Court has consistently held that Article III standing requirements must be met throughout the course of litigation. This Court's decisions in both *Steel Company* and *Gwaltney* affirm this rule. Unless there is evidence of an ongoing violation or a threat of an imminent future violation, the federal courts do not have jurisdiction to entertain the case. In this case, Respondent has demonstrated unequivocally that no ongoing or future harm can occur at the designated site. Therefore, whether Petitioners lack standing or the case is moot, the case should be dismissed.

Such a ruling would not only satisfy the constitutional requirements of a "case or controversy," but would also advance the congressional policy behind citizen suits—to supplement rather than supplant government action. *See Gwaltney*, 484 U.S. at 60. As Amici have discovered first hand, this policy has been subverted. Where no ongoing harm or future risk to the environment is present, activist plaintiffs should not be

allowed to press a "dead" suit to completion just to punish the defendant and to garner attorney's fees. Citizen suits are an aid to government enforcement. They are not an end in themselves.

DATED: July, 1999.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JAN 19 1999
OFFICE OF THE CLERK

No. 98-822

IN THE

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ENVIRONMENTAL TECHNOLOGY COUNCIL,
MICHIGAN MANUFACTURERS ASSOCIATION,
NATIONAL ASSOCIATION OF MANUFACTURERS,
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IN SUPPORT OF RESPONDENT

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SOUTH CAROLINA CHAMBER OF COMMERCE
and the
SOUTH CAROLINA MANUFACTURERS ALLIANCE

IN SUPPORT OF RESPONDENT

This brief *amici curiae* of the Alliance of Automobile Manufacturers, *et al.*, is submitted in support of Respondent Laidlaw Environmental Services (TOC), Inc. (Laidlaw).[1]

[1] No portion of this brief was authored by counsel for a party, and no person or entity other than the *amici curiae* and their members made a

This case involves a private enforcement action filed by Petitioners Friends of the Earth, *et al.* (FOE), pursuant to section 505 of the Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. § 1365. In an opinion issued July 16, 1998, the United States Court of Appeals for the Fourth Circuit ruled that FOE's suit against Laidlaw was moot and remanded the case to the district court with instructions to dismiss. 149 F.3d 303, 307. The Fourth Circuit correctly ruled that this case is moot, and *amici*, like Respondent, submit that the court of appeals' judgment should be affirmed.[2]

Laidlaw achieved compliance a number of years ago with the Clean Water Act requirements that formed the basis for FOE's lawsuit, and there is no reasonable expectation that the matters of which FOE complained in 1992 could reoccur. It bears particular emphasis that Laidlaw's compliance with the Act was the combined result of two factors: (i) Laidlaw's own concerted efforts to achieve compliance, which were undertaken in close coordination with the South Carolina Department of Health and Environment Control (DHEC) and prior to and entirely independent of FOE's lawsuit; and (ii) a change in law -- the correction by DHEC of an unduly stringent surface water discharge limit for mercury that was

---

monetary contribution to the preparation or submission of this brief. The Petitioners and Respondent have consented to the filing of this brief and their respective letters of consent have been filed with the Clerk of the Court.

[2] The industrial facility at issue in this case has been permanently closed. In view of the plant closure, Respondent filed a Suggestion of Mootness with the Court on June 9, 1999, which remains pending at this time. While *amici* believe that Laidlaw's Suggestion of Mootness should be dispositive, *amici's* interest in this case transcends the plant closure. Thus, the perspective from which *amici* address the issues before the Court is that independent of the plant closure, this case became moot (i) as a result of FOE's failure to appeal the district court's denial of equitable relief, or (ii) alternatively, as a result of Laidlaw's compliance with the Clean Water Act.

repeatedly described by the trial court as "drastic" and "draconian."[3]

In addition, *amici* submit that an important aspect of the context in which this case arises, and a significant factor in *amici's* interest in the case, is the longstanding recognition by this Court and other courts that primary responsibility for enforcement of the Clean Water Act is vested in the states. *See EPA v. California ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 207-08 (1976). In contrast, private enforcement suits under section 505 of the Clean Water Act, such as FOE's suit here, were intended to serve a supplementary role if government agencies fail to exercise their enforcement responsibility. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 60 (1987). In derogation of these principles, FOE's enforcement suit represented a duplicative and unnecessary action contrary to the efforts of the regulated entity and the responsible state agency, as well as the public interest. *See ibid.* Simply put, Laidlaw found itself in the unenviable position -- a not uncommon position for major industrial facilities -- in which a Clean Water Act permit condition has proven to be unduly stringent and is subsequently modified. The interposition of FOE's lawsuit reflects a frequent pattern in such circumstances where duplicative citizen suits ride the coattails of state enforcement and unnecessarily burden the federal courts as well as defendants. These matters are of considerable concern to *amici* and are especially compelling in this case where more than seven years ago Laidlaw put in place the requisite measures to reduce mercury discharges (which had been the basis for FOE's lawsuit) to levels that consistently achieved the discharge limits finally established for the facility at issue. In short, this case is moot and was properly dismissed.

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[3] DHEC is the agency of state government responsible for implementation and enforcement of the Clean Water Act in South Carolina.

STATEMENT OF INTEREST OF *AMICI*

As further described below, a*mici* consist of voluntary business and professional associations representing a broad spectrum of industry in the United States. *Amici's* members hold thousands of surface water discharge permits which, like the permits underlying this case, have been issued pursuant to section 402 of the Clean Water Act, 33 U.S.C. § 1342. *Amici* and their members are committed to the goals of the Act, and to that end *amici's* members spend vast sums, in coordination with state and federal regulatory authorities, to upgrade and enhance water pollution control at their industrial facilities.

The Alliance of Automobile Manufacturers (Alliance) is a voluntary non-profit trade association of domestic (United States) and international companies engaged in the manufacture and sale of automobiles and light trucks. The Alliance's members' operations in the United States encompass 255 manufacturing facilities and approximately 600,000 employees. In addition, Alliance members represent more than 90% of motor vehicle sales in the United States.

The American Iron and Steel Institute (AISI) is a trade organization representing North American manufacturers, processors and other producers of iron and steel and related products. Virtually every domestic member of AISI is subject to regulation under the Clean Water Act and parallel state laws. AISI's 50 member companies represent approximately 70% of steel production in the United States. AISI represents the views of its members before courts and regulatory agencies on issues of law and public policy that are of significant concern to them.

The Chamber of Commerce of the United States (Chamber) is the world's largest business federation. The Chamber represents an underlying membership of more than three million businesses and organizations of every size, sector and region. Ninety-six percent of the Chamber's members are businesses with fewer than 100 employees. The Chamber regularly advocates the interests of its members in

court on environmental issues of national concern to the business community.

The Environmental Management Association of South Carolina (EMA) is an association of environmental professionals from South Carolina industry formed to promote responsible waste management practices for protection of the environment. EMA serves its members' communities and businesses through participation in regulatory and legislative initiatives, educational programs and other public advocacy.

The Environmental Technology Council (ETC) is a non-profit corporation which serves as a national trade association for commercial firms that provide technologies and services for the recycling, treatment and secure disposal of industrial and hazardous wastes. ETC's membership also includes companies involved in the cleanup of contaminated industrial sites.

The Michigan Manufacturers Association (MMA) is a business association of private Michigan employers studying matters of general interest to its members, promoting their interests and the interests of all Michigan employers and the general public in the proper administration of laws relating to its members, and otherwise promoting the general business and economic welfare of Michigan. MMA's more than 4,000 members employ 90% of the industrial work force in Michigan -- over one million people. An important aspect of MMA's activities is representing its members as an *amicus curiae* in a broad range of matters before the courts.

The National Association of Manufacturers (NAM) is the nation's oldest and largest broad-based industrial trade association. Its more than 14,000 member companies and subsidiaries, including 10,000 small manufacturers, employ approximately 85% of all manufacturing workers and produce over 80% of the nation's manufactured goods. More than 158,000 additional businesses are affiliated with NAM

through its Associations Council and National Industrial Council.

The South Carolina Chamber of Commerce is the state's largest broad-based association of business and industry. Operating as a statewide organization with more than 2,400 members, the South Carolina Chamber represents businesses, industries, professions and associations of all sizes and types. The South Carolina Chamber serves as a forum for consensus building to facilitate presentation of a unified viewpoint on a broad range of public policy and regulatory matters before legislative, regulatory and judicial forums. The South Carolina Chamber works actively to maintain the state's positive business climate while at the same time enhancing the quality of life for all South Carolinians.

Finally, *amicus* South Carolina Manufacturers Alliance (SCMA) represents more than 80 companies and over 140 industrial facilities in South Carolina. In addition, SCMA members employ more than 80,000 South Carolinians in the manufacture of a wide variety of products. SCMA works closely with state and federal regulatory agencies to provide information, guidance and leadership in the development of laws, regulations and policies regarding environmental protection in South Carolina. SCMA's environmental committee consists of the state's leading scientists and engineers, who have responsibility for environmental management and compliance at their respective companies. SCMA promotes sound engineering, science and economics in both legislative and regulatory processes.

STATEMENT OF THE CASE

The underlying facts and procedural history are fully set forth in Respondent's brief (as well as the district court's decisions), and *amici* address only those facts that have particular relevance to *amici's* arguments in support of Respondent.

When this suit was filed in June 1992, and for several years thereafter, Respondent owned and operated a hazardous waste incineration facility in Roebuck, South Carolina. Wastewater from the air pollution control system for the incinerator was directed to an onsite wastewater treatment plant and discharged to the North Tyger River pursuant to a National Pollutant Discharge Elimination System (NPDES) permit that had been issued to Laidlaw's predecessor by DHEC.[4] Soon after Laidlaw purchased the facility, DHEC issued a new NPDES permit, effective January 1, 1987, containing a number of more stringent effluent limits. The most significant reduction was the effluent limit for mercury, which was reduced from the previous daily maximum discharge concentration of 20 parts per billion (ppb) to 1.3 ppb.

Recognizing that it had imposed a drastic and potentially unattainable reduction in the discharge limit for mercury, DHEC required a feasibility study of possible mercury control technologies and included a permit "reopener" clause if the new limit proved unattainable. The feasibility study was completed by a consulting engineering firm and evaluated eight possible alternative technologies. Initial testing of one of the eight alternatives (carbon adsorption) appeared promising, and as a result Laidlaw chose not to avail itself of the permit reopener clause in order to seek a less stringent mercury limit. J.A. 142-44. DHEC subsequently approved installation of the carbon adsorption technology. Nevertheless, the feasibility study concluded that complying with the 1.3 ppb limit would be extremely difficult and

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[4] The 1972 amendments to the Clean Water Act established the NPDES program, which is based on a system of permits that regulate the discharge of pollutants to navigable waters of the United States. The permit program is administered by the U.S. Environmental Protection Agency and the various states, including South Carolina, to which administration of the program has been delegated. *See* § 402 of the Act, 33 U.S.C. § 1342; *see also EPA v. California*, 426 U.S. at 205-08.

complex given that all available information from manufacturers and performance results for currently available technology indicated that the 1.3 ppb limit was not achievable. J.A. 143.

Unfortunately, the carbon adsorption technology did not allow Laidlaw to comply with the 1.3 ppb mercury limit consistently. It also presented some difficulty (substantially less) for other metals that were regulated under Laidlaw's NPDES permit. As a result, in September 1988 Laidlaw and DHEC entered an administrative order on consent that required further evaluation of control technology alternatives. In accordance with a DHEC-approved compliance schedule, a new treatment technology, referred to as the Lancy system, was installed in late 1990/early 1991. J.A. 144-45. Although the Lancy system, a sulfide precipitation-filtration technology, achieved full compliance with all other effluent limits of the Roebuck facility's NPDES permit, compliance with the 1.3 ppb mercury limit continued to present difficulty, and by early 1992 DHEC officials began preparing an enforcement action against Laidlaw, which resulted in a consent decree entered in South Carolina state court. At the same time Laidlaw was continuing its investigation of alternatives for meeting the 1.3 ppb mercury limit. Through experimentation with use of activated carbon, micro-filtration and ion exchange, Laidlaw discovered that the addition of activated carbon to the end of the Lancy system would achieve compliance with the 1.3 ppb limit. J.A. 145-47, 155.[5] The district court commended Laidlaw's genuine efforts to achieve compliance, particularly given the highly restrictive nature of the 1.3 ppb mercury limit. J.A. 173-74.

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[5] As part of this effort, Laidlaw also severely restricted the feed rate of mercury-bearing waste to the Roebuck facility's incinerator. The district court, however, found no demonstrated relationship between reducing the mercury feed rate and compliance with the 1.3 ppb limit for mercury. J.A. 155, 174-76.

During this same period, and well before Petitioners' lawsuit, Laidlaw applied to DHEC for a new NPDES permit which would, among other things, correct the unduly stringent 1.3 ppb mercury limit.[6] In response, DHEC issued an amended permit in 1993 providing new permit limits for a number of pollutants, including mercury. J.A. 148. Laidlaw appealed the 1993 permit because it continued to contain erroneous requirements for mercury. First, the 1993 permit failed to include both daily maximum and monthly average mercury limits, even though NPDES regulations required such two-part limits in order to control both short-term (acute) and long-term (chronic) impacts on the receiving water. *Ibid.* Second, in determining the daily maximum -- or short-term -- component of the two-part limit, the 1993 permit had incorrectly relied on water quality criteria that are intended for use in determining longer term or chronic standards, such as a monthly average limit for mercury (monthly average limits are typically set at lower allowable pollutant concentrations in comparison to the somewhat higher pollutant concentrations that underlie short-term limits). The 1987 permit reflected the same shortcoming -- that is, the daily maximum or acute limit for mercury was determined by reference to water quality criteria that address chronic or long-term impacts.

To address these matters, DHEC agreed in 1994 to reissue the permit again and correct the permit's requirements for mercury. Specifically, the effluent limits for mercury in the 1994 permit consisted of a new daily maximum discharge concentration of 10 ppb and a monthly average concentration limit of 1.25 ppb. The district court summarized these changes in the new permit as follows:

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[6] Laidlaw's NPDES permit renewal was filed on December 31, 1991, four months before notice of intent to sue Laidlaw was issued by one of the Petitioners, *see* Clean Water Act, § 505(b)(1)(A), 33 U.S.C. § 1365(b)(1)(A), and six months before Petitioners commenced suit in June 1992.

> The 1994 Permit, therefore, significantly altered Laidlaw's discharge obligations in two respects: it established a monthly average where none had existed before, and it increased the daily maximum to more than seven times what it had been previously.

J.A. 148-49. The impact of these significant alterations to Laidlaw's discharge obligations is evident from the record. Appendix A to the district court's January 1997 opinion chronicles all of Laidlaw's mercury violations over the eight-year period from January 1987 through January 1995. Of the 489 mercury excursions shown, 92 percent (or 449) would not have been violations of the corrected limits for mercury in the 1994 permit. Within less than one week of the filing of this lawsuit in June 1992, and continuing until the Roebuck plant closed more than six years later, there were no discharge concentrations for mercury that exceeded the 10 ppb daily maximum limit of the 1994 permit.

Given Laidlaw's state of compliance, and the absence of any demonstrated harm to the environment, the district court imposed a civil penalty but denied in all respects Petitioners' request for an injunction and other equitable relief. J.A. 182-83. Although Petitioners appealed the district court's civil penalty determination to the Fourth Circuit, Petitioners did not challenge the district court's denial of equitable relief. In its opinion addressing Petitioners' appeal, the Fourth Circuit found Petitioners' relinquishment of their claim for equitable relief to be dispositive, noting that "[b]ecause Plaintiffs have not appealed the denial of declaratory and injunctive relief, the only potential relief that may be available to redress their claimed injuries is the civil penalty imposed upon Laidlaw, which would be paid to the United States Treasury." 149 F.3d at 306. The court of appeals relied on this Court's decision in *Steel Co. v. Citizens for a Better Environment*, 118 S. Ct. 1003 (1998), in which the Court ruled that civil penalties paid to the U.S. Treasury do not redress a private plaintiff's alleged injury for violation of environmental laws.

Id. at 1019. The court of appeals concluded that FOE's suit against Laidlaw had become moot because civil penalties payable to the government -- the only remedy available to Petitioners, given relinquishment of their claim for injunctive relief -- would not redress any injury FOE had suffered. 149 F.3d at 306-07. Accordingly, the court of appeals remanded the case to the district court with instructions to dismiss.

SUMMARY OF ARGUMENT

To satisfy the case-or-controversy requirement of Article III of the Constitution, a federal court litigant must have a personal stake in the outcome, which is a requirement throughout the litigation. In this case, however, Petitioners ceased to have a personal stake because they relinquished their claim for injunctive relief regarding the Clean Water Act violations at issue, and instead pursued only civil penalties (as well as attorneys' fees). This conclusion follows from the fact that civil penalty relief, which is directed solely to the United States Treasury, does not inure to the benefit of a citizen plaintiff. Having relinquished the only claim for relief which could provide the requisite personal stake, Petitioners' case became moot.

Alternatively, this case is also moot because there was no reasonable expectation (even before the Roebuck plant was permanently closed) that Laidlaw would again be in violation of its discharge permit. This follows from the fact that prior to and independent of FOE's lawsuit Laidlaw was already vigorously pursuing the requisite pollution control measures, and long ago achieved permanent and complete NPDES compliance.

Finally, the determination of mootness in this case will support, rather than conflict with, the congressional policies underlying the Clean Water Act. Consistent with Congress' intent that states have the primary role in enforcement of the Act, determination of mootness will properly recognize the unnecessary, counterproductive nature of duplicative citizen

suits that ride the coattails of successful compliance efforts by NPDES permittees and state regulatory authorities.

ARGUMENT

I. Given FOE's Abandonment Of Any Claim For Equitable Relief, The Fourth Circuit Correctly Determined That FOE's Appeal Was Moot, As Civil Penalties Alone Cannot Redress A Party's Alleged Injury For Purposes Of Article III Justiciability

Under Article III of the Constitution, federal courts may adjudicate only actual, on-going cases or controversies. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997); *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975). To invoke Article III jurisdiction in the first instance, a litigant in federal court (i) must have suffered (or be imminently threatened with) an actual injury that (ii) is traceable to the defendant's activities and (iii) is likely to be redressed by the relief requested. *Steel Co.*, 118 S. Ct. at 1016-17. These three elements of injury in fact, causation and redressability form the "irreducible constitutional minimum of standing," *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), and are the core of Article III's case-or-controversy requirement. *Steel Co.*, 118 S. Ct. at 1017.

The case-or-controversy requirement embodied in standing doctrine, and the three prerequisites to standing, must be met at every stage of review, not merely at the time suit is brought. *Steffel v. Thompson*, 415 U.S. 452, 459 n.10 (1974); *Arizonans for Official English*, 520 U.S. at 67. If not, the case becomes moot. *Id.* at 74. Normally, a case is moot when the passage of time and intervening events have caused the case to lose "'its character as a present, live controversy of the kind that must exist if [the Court is] to avoid advisory opinions on abstract questions of law,'" *Princeton University v. Schmid*, 455 U.S. 100, 103 (1982) (per curiam) (quoting *Hall v. Beals*, 396 U.S. 45, 48 (1969) (per curiam)), or if the

parties no longer possess a "legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496 (1969).[7]

For the purpose of the Court's mootness analysis in this case, the pertinent question is whether the Petitioners continue to have a genuine "personal stake" in resolution of the issues they have brought before the Court. *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 478 (1990) (at all stages the "parties must continue to have a 'personal stake in the outcome' of the lawsuit." (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983))). "[T]he Article III question is not whether the requested relief would [provide a benefit] to the world at large, but whether [the litigant itself] has a stake in that relief." *Lewis*, 494 U.S. at 479. The personal stake requirement has no exceptions. Kenneth C. Davis, *Standing: Taxpayers and Others*, 35 U. Chi. L. Rev. 601, 616-17 (1968).[8]

In this case, the Court has been asked to review the Fourth Circuit's decision to vacate as moot the imposition against Laidlaw of civil penalties payable to the U.S. Treasury -- relief in which Petitioners, as private parties, have no personal stake, as they do not receive payment. *Steel Co.*, 118 S. Ct. at 1018 (civil penalties paid to the Treasury do not redress private plaintiff's injury for standing purposes because mere gratification in seeing defendant punished and

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[7] The Court has described mootness as "'the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of litigation (standing) must continue throughout its existence (mootness).'" *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980) (quoting Henry Monaghan, *Constitutional Adjudication: The Who and When*, 82 Yale L.J. 1364, 1384 (1973)).

[8] The rule requiring litigants to have an "interest of their own at stake is applied so rigorously that it has been termed the 'one major proposition' in the law of standing to which 'the federal courts have consistently adhered . . . without exception.'" *United States Parole Comm'n*, 445 U.S. at 412 (Powell, J., dissenting) (quoting 35 U. Chi. L. Rev. at 617).

deterrence of future harm, if deemed sufficient, "would make the redressability requirement vanish"). Declaratory and injunctive relief, which were denied by the district court due to the absence of environmental harm and Laidlaw's well-established record of compliance, J.A. 182-83, arguably could have provided the requisite personal stake. Petitioners, however, abandoned their pursuit of equitable relief when they appealed the district court's civil penalty ruling but determined not to appeal the denial of an injunction. Clearly, a claim becomes moot if, as in this case, it is abandoned on appeal. *See, e.g., Deakins v. Monaghan*, 484 U.S. 193, 199-201 (1988). Thus, in the absence of any request for relief that could conceivably redress Petitioners' professed injury, there was no longer any cognizable case or controversy properly before the Fourth Circuit.

The Court's per curiam opinion in *Ashcroft v. Mattis*, 431 U.S. 171 (1977), is very much on point. There the plaintiff filed suit, pursuant to 42 U.S.C. § 1983, against police officers responsible for the shooting death of his son, who was attempting to escape arrest. The plaintiff sought to recover damages, and also to obtain a declaratory judgment that the relevant state statute, which authorized the use of deadly force to apprehend felons, was unconstitutional. Finding that a defense of good faith had been established, the district court denied both forms of relief. The plaintiff appealed the denial of the declaratory judgment, but not the denial of damages. The plaintiff's failure to appeal the damages issue mooted not just the question of damages, but the entire case, because the plaintiff's remaining interest in the case -- that is, in a declaratory ruling as to the validity of the state statute -- had been reduced to a mere abstract, non-justiciable interest. In other words, the predicate for the plaintiff's action was the damages claim because it provided the personal stake in the outcome that is a prerequisite to standing. But having abandoned pursuit of damages, "[n]o 'present right' of [plaintiff] was at stake." *Id.* at 172.

In this case, as in *Ashcroft*, Petitioners abandoned the one form of relief that could provide them with standing, thereby mooting the case. Just as the decision not to appeal his claim for money damages divested the *Ashcroft* plaintiff of standing, Petitioners' decision not to appeal their claim for equitable relief divested them of standing in this case; and just as the "emotional satisfaction" the *Ashcroft* plaintiff expected to obtain from a declaratory judgment could not save his case from mootness, *id.* at 173, neither can the "psychic satisfaction" of seeing Laidlaw pay civil penalties to the Treasury save Petitioners' case from the same disposition. *Steel Co.*, 118 S. Ct. at 1019.

In this regard it bears emphasis that *Steel Co.* clearly held that civil penalties paid to the Treasury do not redress a private plaintiff's injury for purposes of Article III's case-or-controversy requirement. *Id.* at 1018. Petitioners and their supporting *amici* nevertheless misread that decision. They insist that the *Steel Co.*'s redressability holding is limited to instances where a claim is made to assess civil penalties for wholly past violations, and does not apply if violations are ongoing when suit is brought. *See, e.g.*, Pet'r Br. at 14-15, 20-22; Brief of the United States as *Amicus Curiae* (Gov't Br.) at 9, 13. To the contrary, *Steel Co.* makes clear that the reason civil penalties do not redress a private plaintiff's injuries is because the private plaintiff does not receive them. 118 S. Ct. at 1018.

Likewise, Petitioners and their supporting *amici* contend that pursuit of civil penalties in the absence of a claim for injunctive relief is sufficient to meet the redressability element of standing for Article III purposes because of the deterrent effect civil penalties may have when violations are ongoing at the time a suit is filed. *See, e.g.*, Pet'r Br. at 22; Gov't Br. at 25-27. While *amici* disagree that civil penalties would provide any deterrent under the facts of this case, the more significant point is that Petitioners' (and their *amici*'s) argument proves too much. Specifically, for purposes of Article III, the date of the complaint -- that is, whether there

are only pre-complaint violations -- has no significance: if the deterrent effect of a civil penalty is sufficient to meet the redressability element of standing in a case with post-complaint violations, then that same deterrent effect would also be sufficient in a case involving only pre-complaint violations. That is because the role of the penalty in encouraging compliance would be equally applicable in both situations. *Steel Co.*, however, makes clear that such deterrence does not satisfy the case-or-controversy requirement because in requesting civil penalties Petitioners

> seek[ ] not remediation of [their] own injury . . . but vindication of the rule of law -- the "undifferentiated public interest" in faithful execution of [the Clean Water Act]. This does not suffice. . . . [I]t is [not] enough that [Petitioners] will be gratified by seeing [Respondent] punished for its infractions and that the punishment will deter the risk of future harm. . . . Obviously, such a principle would make the redressability requirement vanish. . . . [A]lthough a suitor may derive great comfort and joy from the fact that the United States Treasury is not cheated, that a wrongdoer gets his just deserts, or that the nation's laws are faithfully enforced, that psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury.

118 S. Ct. at 1018-19 (citations omitted).

In short, absent the pursuit of a viable claim for injunctive relief, the imposition of civil penalties payable to the Treasury does not give a citizen plaintiff a sufficient personal stake for Article III purposes. Having relinquished their claim for equitable relief, the Petitioners' appeal of the district court's civil penalty ruling was not for the vindication of their own rights, but rather for "vindication of the rule of law -- the 'undifferentiated public interest' in faithful execution'" of the Clean Water Act. *Id.* at 1018 (quoting *Lujan*, 504 U.S. at 577). *See also Maine v. Taylor*, 477 U.S.

131, 137 (1986) (private parties have no judicially cognizable interest in the prosecution of another); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 897 (1984) (private parties have no judicially cognizable interest in obtaining administrative enforcement of the law). Simply put, Petitioners' desire to see a larger civil penalty imposed on Laidlaw simply fails to meet Article III's justiciability requirements, and the Fourth Circuit correctly decided that Petitioners' case was moot.

II. Alternatively, FOE's Case Was Mooted By Laidlaw's Voluntary Cessation Of Permit Exceedances, Because There Is No Reasonable Expectation That Such Exceedances Will Recur, And Any Effects Of The Exceedances Have Been Completely Eradicated

As demonstrated above, FOE's relinquishment of its claim for equitable relief mooted this case. However, instead of properly focusing on the decisive effect of FOE's own actions in mooting the case, FOE (and supporting *amici*) mistakenly emphasize the "voluntary cessation" case law exemplified by *United States v. W.T. Grant Co.*, 345 U.S. 629 (1953), and on that basis contend that Laidlaw's good faith actions in achieving post-complaint compliance do not moot this case. *See, e.g.*, Pet'r Br. at 32-35; Gov't Br. at 17-19. Contrary to those arguments, the actions taken by Laidlaw provide a sound alternative basis for concluding that this case is moot.

Amici of course recognize that "voluntary cessation of allegedly illegal conduct" does not of its own force moot a case. *W.T. Grant Co.*, 345 U.S. at 632. A case will, however, be moot if (i) it can be "said with assurance" that there is no reasonable expectation that the "alleged violation will recur" and (ii) "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979). "When both conditions are satisfied it may be said that the case is moot because neither party has a legally cognizable interest in the final determination of the underlying questions of fact and law." *Ibid.* Both conditions are met in this case.

There is no reasonable expectation that Laidlaw will again be in violation of its discharge permit.[9] As explained in detail by the district court, the vast majority of the permit violations of which Petitioners complained occurred before suit was filed, and Laidlaw was already vigorously pursuing steps in coordination with DHEC to address the level of mercury in the Roebuck facility's wastewater discharges at the time that the statutorily-required notice of intent to sue was given. In fact, within less than a week of the filing of this suit, and continuing for more than six years thereafter (until Laidlaw permanently closed the Roebuck facility), there were no discharges of mercury in excess of the 10 ppb daily maximum limit that was finally established for the facility.[10] In short, given the fact that for more than six years Laidlaw consistently achieved the 10 ppb daily maximum limit (a limit seven times *less* stringent than the incorrect and "draconian" limit previously in effect), there was certainly "no reasonable expectation" that violations would recur. *W.T. Grant Co.*, 345 U.S. at 633.

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[9] Of course, now that Laidlaw has permanently closed the Roebuck facility and removed or sold its incineration equipment, that reasonable expectation is an absolute certainty. See Respondent's Suggestion of Mootness, Case No. 98-822, at 4 (June 9, 1999); see also supra note 2.

[10] According to the district court, there were 14 exceedances of the "old" maximum daily mercury limit of 1.3 ppb on or after June 12, 1992, the day Petitioners filed suit. J.A. 195. As the district court recounted, the 1.3 ppb permit limit was calculated incorrectly and eventually changed to 10 ppb to remedy the error. J.A. 148-49. In determining whether a case is moot, courts should retroactively apply administrative rulings in effect at the time of decision-making on appeal. *See, e.g., National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 661 n.1 (1989). This is fully consistent with the principle that an NPDES permit condition cannot be challenged in an enforcement proceeding. *See* 33 U.S.C. § 1369(b)(2). That is because the issue for purposes of determining mootness is not whether the actions of the permittee at a previous point in time would have constituted a permit violation, but whether due to intervening events the parties no longer have a cognizable interest in the outcome.

Likewise, the effects of Laidlaw's violations, assuming that there were any effects, have been completely and irrevocably eradicated. As the district court found

> Laidlaw's monitoring and reporting deficiencies, all of which have long since been resolved, produced no direct environmental impact. There has been no demonstrated proof of harm to the environment.
>
> . . . .
>
> . . . [N]o fish in [the North Tyger] river has a mercury level even one-quarter of a limit that is ten times lower than necessary to protect human health. This test result, considered together with the nine years of acute and chronic toxicity testing data as to the effect of Laidlaw's total effluent on all other aspects of the stream, leads the court to conclude that Laidlaw's effluent, even with the permit exceedances it has experienced, has had no demonstrated adverse affect on the environment.

J.A. 162, 164. Thus, the second condition for mootness is clearly met as well. Indeed, Laidlaw caused no injury and there were no effects that needed to be redressed.[11]

Laidlaw's conformity with the standard for mootness enunciated in *Davis* is readily demonstrated by comparing Laidlaw's actions to those of the defendants in the "voluntary compliance" cases. Here, Laidlaw's actions to address its mercury discharges were well underway prior to FOE's complaint, and thus were taken independent of, and without regard to, FOE's lawsuit. In contrast, where the Court has concluded that voluntary cessation of a defendant's actions

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[11] The district court's finding that there was no harm to the environment provides another basis for concluding that Petitioners' claims are not justiciable. *See, e.g., Public Interest Research Group of New Jersey, Inc. v. Magnesium Elektron, Inc.*, 123 F.3d 111, 120-23 (3d Cir. 1997) (case not justiciable without injury in fact).

did not moot a case, the facts demonstrated post-suit cessation only, significant possibilities for backsliding, and/or cosmetic changes or only partial reform. *See, e.g., W.T. Grant Co.*, 345 U.S. at 634 (defendant had previously refused to terminate the illegal actions at issue -- interlocking directorates -- "despite five years of administrative attempts to persuade him of their illegality," and defendant would not commit to avoiding similar violations in the future); *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 & n.11 (1982) (city's repeal of objectionable ordinance did not preclude it from reenacting precisely the same provision if judgment were vacated, and city had announced just such an intention); *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968) (in antitrust injunction action against association as well as its individual members, mere fact of dissolution of the association and statement that it was uneconomical to resume the conduct at issue was insufficient to satisfy mootness burden).

In sharp contrast to the cases discussed above are cases which the Court found moot based on voluntary compliance. In those cases, the Court relied on the defendant's good faith efforts to comply, the permanence of the changes made to achieve compliance, the history of compliance (or attempted compliance) prior to suit and/or consistent compliance thereafter. *See, e.g., Davis*, 440 U.S. at 631-33 (fire department's good faith efforts at revamping hiring practices so as to address past discrimination indicated past practices would not recur despite district court's finding of necessity for injunction and fact that remedial measures post-dated commencement of litigation); *SEC v. Medical Comm. for Civil Rights*, 404 U.S. 403, 406 (1972) (where defendant corporation declined to include disputed shareholder proposal in proxy statement until after suit was brought, fact that proposal ultimately garnered little shareholder support led Court to speculate that corporation would in the future include proposal in its proxy statements, rather than repeat litigation, thereby mooting case). *Cf. Iron Arrow Honor Soc'y v. Heckler*, 464 U.S. 68, 72 (1983) (per curiam) (Court

determined that case was moot because there was no reasonable likelihood that university, having reversed position that gave rise to controversy, would later change its mind).

The factual similarities between the cases discussed immediately above and this case are thoroughly demonstrated in the record, and "voluntary cessation" moots Petitioners' claims. More specifically, long before receiving Petitioners' pre-suit notice letter, Laidlaw was well on its way to achieving compliance, having installed additional pollution control equipment in close coordination with the responsible state agency; compliance was achieved shortly after suit was brought and was consistently maintained for over six years; and most of the discharge violations were the result of an excessively restrictive permit limit that was technologically impossible to meet consistently, and which was subsequently corrected. The Court, accordingly, should conclude that Laidlaw met its burden of demonstrating mootness through its own successful actions to achieve compliance, as those actions "did not consist merely of pretensions or promises but [were] overt and visible [efforts] carried out by extensive operations which [had] every appearance of being permanent," and "[t]he record discloses no threat or probability of resumption" of the disputed actions. *United States v. Oregon State Medical Soc'y*, 343 U.S. 326, 334 (1952).

In sum, Laidlaw's voluntary efforts in achieving compliance provide a sound alternative basis for affirming the court of appeals' judgment.[12]

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[12] Citing *Vitek v. Jones*, 436 U.S. 407, 410 (1978), and *McLeod v. General Electric Co.*, 385 U.S. 533, 535 (1967), the United States suggests that if Laidlaw's voluntary compliance eliminated any reasonable prospect of future violations, the proper course was for the Fourth Circuit to remand the case to the district court for consideration of mootness. Gov't Br. at 22. Both *Vitek* and *McLeod* addressed new developments that potentially mooted the case, but which the courts below had not had the opportunity to consider. That is not the situation here, as the facts that moot this case -- Laidlaw's permanent compliance -- were extremely well developed on the record before the district court. In such circumstances, it

III. Contrary To FOE's Contentions, The Finding Of Mootness In This Case Will Advance The Policies Underlying The Clean Water Act

Petitioners also contend that declaring this case moot will conflict with the congressional policies underlying the Clean Water Act. Pet'r Br. at 35-40. To the contrary, the determination of mootness in this case supports those policies, and Petitioners' opposing arguments are unsound.

First, Petitioners set up a strawman, suggesting that the court of appeals' mootness determination means that "civil penalties cannot be imposed for any violations as long as the defendant comes into compliance some time during the pendency of the case." *Id.* at 38. To the contrary, this case is moot because Laidlaw achieved, through good faith efforts, a permanent state of compliance, which was demonstrated over an extended period, and neither Respondent nor *amici* suggest in any way that mootness occurs simply by "com[ing] into compliance some time during the pendency of the case." *Ibid.* Moreover, although Petitioners argue that Respondent's (and *amici*'s) position gives "the defendant . . . every incentive to continue its noncompliance," *ibid.*, in fact just the opposite incentive is created. Thus, the more promptly the defendant implements the measures necessary to eliminate the cause of violations, the greater the likelihood that a case will be moot or, if the case is not moot, that the defendant will succeed in mitigating its civil penalty exposure. The "Russian roulette" strategy that Petitioners attribute to NPDES permittees -- choosing to prolong noncompliance -- is irrational.

Petitioners also make the flawed argument that the court of appeals' ruling will create a disincentive for plaintiffs to bring suits under section 505, which are "'often initiate[d] . . .

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is entirely appropriate for the Court to consider whether Laidlaw's documented, long-term compliance mooted the case. *See, e.g., Davis*, 440 U.S. at 634 (Court found defendant's voluntary actions mooted the case, even though lower courts apparently had not addressed the issue).

to ensure that penalties are imposed.'" *Id.* at 39 (quoting *ASLF v. Pan American Tanning Corp.*, 993 F.2d 1017, 1021 (2d Cir. 1993)). In considering this argument, it bears emphasis that section 505 was "expressly modeled" after the citizen suit provision in section 304 of the Clean Air Act, 42 U.S.C. § 7604. *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 17 n.27 (1981). Under both statutes the trial court could issue an enforcement order or injunction. While section 505 added authority (which was then absent from section 304) for the court to supplement its injunction with civil penalties, section 505 reflected "no change in purpose" from section 304. *Pawtuxet Cove Marina, Inc. v. Ciba-Geigy Corp.*, 807 F.2d 1089, 1092-93 (1st Cir. 1986). Legislative history shows that section 505 was "carefully restricted" to the same types of actions as section 304, *see* S. Rep. No. 92-414 (1971), *reprinted in* 2 *A Legislative History of the Water Pollution Control Act Amendments of 1972* (CWA Leg. Hist.) at 1497 (1973) -- that is, to abatement or injunction actions; "successful abatement" is, of course, the intended "result of a citizen proceeding." S. Rep. No. 92-414 at 81, 2 CWA Leg. Hist. at 1499. In short, section 505 is fundamentally an injunctive remedy and is not intended, as Petitioners argue, "to ensure that penalties are imposed." Nothing in the court of appeals' decision detracts from the purpose Congress intended.[11]

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[11] The injunction remedy of section 304 of the Clean Air Act was later supplemented with civil penalties. *See* Pub. L. No. 101-59, § 304, 104 Stat. 2399, 2576-77 (1990) (codified as amended at 42 U.S.C. § 7604).

Petitioners further contend that affirmance here would encourage defendants in other citizen suits to engage in dilatory litigation tactics in order to "buy time" to come into compliance, and thereby increase their chances of avoiding the imposition of civil penalties. Pet'r Br. at 38. If citizen plaintiffs find themselves confronted with unjustified, dilatory litigation tactics, they have the full arsenal of remedies available to every civil litigant in federal court. *See, e.g.*, Fed. R. Civ. P. 11 (addressing frivolous pleadings and motions practice); 16(b) (addressing scheduling of litigation, including time limits on motions and discovery); and 37 (providing sanctions for discovery abuse).

Aside from offering invalid policy arguments, Petitioners fail to consider the policy consequences of allowing a citizen suit to proceed under the circumstances of this case. As the district court emphasized, faced with the extremely difficult task of attempting to meet the 1.3 ppb mercury limit, Laidlaw would have been justified at several points in abandoning that effort and seeking a less stringent mercury limit under the 1987 permit's reopener clause. *See* J.A. 177-78. This is similar to the hypothetical the Court described in *Gwaltney*, in which an NPDES permittee, as part of the resolution of an enforcement process, agreed to

> take some extreme corrective action, such as to install particularly effective but expensive machinery, that it otherwise would not be obliged to take. If citizens could file suit, months or years later, in order to seek the civil penalties that the Administrator chose to forgo, then the Administrator's discretion to enforce the Act in the public interest would be curtailed considerably. The same might be said of the discretion of state enforcement authorities.

484 U.S. at 61. In this case, Laidlaw would have been fully justified, as any NPDES permittee in Laidlaw's position would have been, in pursuing the reopener clause of the 1987 permit and, if necessary, challenging an insufficient response by DHEC. That would have been especially true if at the time Laidlaw had already been confronting the specter of FOE's entirely duplicative citizen suit. But as the district court

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Finally, Petitioners complain that, if the Court were to affirm, citizen plaintiffs would have a "to appeal every denial of injunctive relief" in order to keep civil penalty claims alive on appeal. Pet'r Br. at 39. Contrary to Petitioners' implication, the Fourth Circuit's decision does not encourage unnecessary appeals of orders denying injunctive relief. Instead the court of appeals' decision simply recognizes that a civil penalty-only appeal loses its character as a justiciable case-or-controversy where the one form of relief that provides the plaintiff's requisite personal stake is relinquished.

emphasized, "[i]nstead, Laidlaw elected the more difficult and costly path: install the technology in an attempt to meet the 1.3 ppb limit." J.A. 177. And just as in the *Gwaltney* hypothetical, the environment benefited from Laidlaw's choice because

> for the foreseeable future [Laidlaw was required to] comply with a mercury limit that [was] determined in part by the fact that it ha[d] purchased the technology to achieve an unusually restrictive limit. The limit ordinarily would have been much higher.

J.A. 178-79. Put another way, what public policy is achieved by penalizing a permit holder for failing to meet unattainable standards? The answer is, of course, none. Laidlaw pursued cutting-edge pollution control in a vigorous effort to achieve extremely stringent standards. To allow suits like FOE's under these circumstances will only serve to discourage such initiative.

Finally, throughout the difficult process of attempting to achieve compliance with the 1.3 ppb limit, Laidlaw kept DHEC apprised of all efforts to achieve compliance, including review and approval of each of the studies, recommendations, and wastewater treatment system modifications Laidlaw made to achieve compliance with its permit. *See* J.A. 174. Allowing Petitioners to maintain their entirely duplicative enforcement action in such circumstances disregards this Court's admonition that states have primary authority and discretion to enforce the Clean Water Act. *See Gwaltney*, 484 U.S. at 60-61. NPDES permittees in Laidlaw's position will not agree to the extreme corrective measures that Laidlaw pursued if they will nevertheless face the specter of a duplicative citizen suit that rides the coattails of comprehensive state enforcement. *See Arkansas Wildlife Fed'n v. ICI Americas, Inc.*, 29 F.3d 376, 383 (8th Cir. 1994) (allowing duplicative citizen suit "despite a state's diligent efforts at administrative enforcement, could result in undue interference with, or unnecessary duplication of, the legitimate efforts of the state agency. We believe that such a

result would undermine, rather than promote, the goals of the [Clean Water Act], and is not the intent of Congress"). In short, as explained in *North & S. Rivers Watershed Ass'n v. Town of Scituate*, 949 F.2d 552, 556 (1st Cir. 1991):

> Duplicative actions aimed at exacting financial penalties in the name of environmental protection at a time when remedial measures are well underway do not further [that] goal. They are, in fact, impediments to environmental remedy efforts.

CONCLUSION

In view of the foregoing, *amici curiae* Alliance of Automobile Manufacturers, *et al.*, respectfully urge the Court to affirm the judgment of the court of appeals.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JUL 19 1999
OFFICE OF THE CLERK

(20)

No. 98-822

In the Supreme Court of the United States

FRIENDS OF THE EARTH, ET AL.,
PETITIONERS,

v.

LAIDLAW ENVIRONMENTAL SERVICES (TOC), INC.
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF AMICI CURIAE OF THE WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF RESPONDENT

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BRIEF AMICI CURIAE OF THE WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF RESPONDENT

INTERESTS OF AMICI CURIAE[1]

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center based in Washington, D.C., with supporters nationwide. WLF devotes substantial resources to litigating cases and publishing educational materials that promote, *inter alia*, a limited and an accountable government, the proper role of the judiciary, and reasonable government regulation. Excessive regulation, related litigation, and excessive penalties and attorney fee awards add enormous and unnecessary burdens to our economy in the form of increased consumer prices, lower productivity, and loss of jobs.

WLF has participated as amicus curiae in the Supreme Court and lower federal courts in numerous cases that are relevant to this case. In some of those cases, WLF argued that the plaintiffs lacked Article III standing. *See, e.g.*, *Steel Co. v. Citizens for a Better Env't*, 118 U.S. 1003 (1998); *Lujan v. National Wildlife Fed'n*, 497 U.S. 871 (1990);

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for a party in this case authored this brief in whole or in part, and no persons or entities other than amicus Washington Legal Foundation, its supporters, or counsel, contributed financially to the preparation or submission of this brief. This brief is being filed with the written consent of the parties which have been filed with the Clerk.

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992); *Public Interest Research Group of New Jersey v. Magnesium Elektron, Inc.*, 123 F.3d 111 (3d Cir. 1997).

WLF has also challenged the validity of the Environmental Protection Agency's (EPA) flawed BEN Economic Model. EPA and the courts use the BEN Model in cases such as the one at bar to assess civil penalties for environmental violations by computing the economic benefit to the facility for noncompliance. WLF discovered through the Freedom of Information Act (FOIA) that the EPA had suppressed evidence suggesting that the BEN Model exaggerated the economic benefit of noncompliance which resulted in the assessment of inflated civil penalties. *See Washington Legal Foundation v. United States EPA*, CA No. 93-1202 (CRR) (D.D.C. 1996); *see also* 64 Fed. Reg. 32948, 32972 (June 18, 1999) (referring to disclosure of documents in response to WLF's FOIA lawsuit).

The Allied Educational Foundation (AEF) is a nonprofit charitable and educational foundation based in New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, including law and public policy, and has appeared as a co-amicus curiae in numerous cases with WLF.

While amici support all of the arguments made by the respondent, WLF will focus upon the jurisdictional issues in this case. In particular, while amici believe the court of appeals correctly decided that this case was moot, amici will argue that the lack of constitutional and statutory standing provide this Court with alternative grounds upon which to affirm the court of appeals.

STATEMENT OF THE CASE

In the interests of judicial economy, amici hereby adopt the Statement of the Case as presented in the respondent's brief. In brief, Laidlaw Environmental Services (TOC), Inc. (Laidlaw) operated a hazardous waste incinerator in Roebuck, South Carolina since 1986 when it was issued a National Pollution Discharge Elimination System (NPDES) permit by South Carolina's Department of Health and Environment Control (DHEC) pursuant to Section 402 of the Clean Water Act. 33 U.S.C. § 1342. The permit authorized Laidlaw to discharge certain waste metals into the North Tyger River within certain limits. *Friends of the Earth v. Laidlaw Environmental Services (TOC), Inc.*, 956 F. Supp. 588 (D.S.C. 1998). The prior operator of the facility was permitted to discharge up to 20 parts per billion (ppb). However, DHEC proposed to set the standard for Laidlaw at an exceedingly low level of only 1.3 ppb under EPA's 1986 water quality standard. That level is well below the 2 ppb of mercury considered to be a safe level for drinking water.

Laidlaw expended considerable resources for technical feasibility studies and other costs to achieve this extremely low level of discharge. Through the diligent efforts of Laidlaw's personnel, Laidlaw was able to develop technology to achieve the 1.3 ppb level for mercury. Eventually, the permit was modified to allow for 10 ppb, although it could have been legally set as high as *200 ppb* but for Laidlaw's demonstrated efforts that it could reduce the levels. 956 F. Supp. at 598.

From 1987 to 1992, Laidlaw had intermittently exceeded what the district court referred to as the

"draconian" low limits for mercury despite Laidlaw's best efforts to do otherwise. By 1991, Laidlaw had met the discharge levels for all of its other non-mercury metals. In addition, Laidlaw had committed technical and minor reporting violations that were characterized by the district court as "anomalies." *Id.* at 602. The crucial finding by the court, however, was that there was no showing of environmental harm from these mercury exceedances and reporting errors. *Id.*

Nevertheless, plaintiff Friends of the Earth, having obtained Laidlaw's discharge data that it was required to file with the EPA and DHEC, submitted a 60-day notice of intent to sue letter under the Clean Water Act to Laidlaw and federal and state agencies, even though Laidlaw had been working closely with DHEC to develop ways to prevent the occasional exceedances, and had greatly reduced them. A few days before the 60-day period expired, DHEC and Laidlaw entered into a consent order in state court to resolve the violations and to pay a fine. While the Clean Water Act precludes a citizen suit when such actions have been commenced by state or federal authorities, the plaintiff filed a citizen suit in federal court alleging that they and their members have suffered both informational injuries and harm to their environmental interests in the North Tyger River.

The trial court concluded that the plaintiffs barely had standing, that the suit was not precluded by DHEC's action, imposed civil penalties of approximately $400,000 for the technical violations, but denied plaintiffs' request for declaratory and injunctive relief because of Laidlaw's substantial compliance, good faith efforts, and the lack of environmental harm.

The plaintiffs appealed, claiming that the fines should have been higher, while Laidlaw argued on appeal that the plaintiffs lacked both constitutional and statutory standing to bring the action in the first place. The court of appeals reserved ruling on those issues, and instead held that because the plaintiffs did not appeal the denial of injunctive relief, that meant that the only relief available was the payment of civil penalties by Laidlaw to the U.S. Treasury. However, the payment of fines would not redress any injury suffered by the plaintiffs; consequently, the case was therefore rendered moot by the action of the plaintiffs. 149 F.3d 303, 306 (4th Cir. 1998). In so ruling, the court of appeals relied on this Court's recent decision in *Steel Co. v. Citizens for Better Environment*, 118 S. Ct. 1003 (1998). Laidlaw has since closed its facility.

SUMMARY OF ARGUMENT

While this Court can affirm the judgment of the court of appeals either on the mootness grounds relied upon by the court (lack of redressability of the injury by civil fines), or on the more traditional mootness grounds presented in Laidlaw's Suggestion of Mootness (cessation of complained of conduct), amici submit that the judgment can be affirmed on alternative jurisdictional grounds: that the plaintiffs lack both constitutional and statutory standing to litigate this case.

Because the district court found that there was no environmental harm caused by Laidlaw's discharges, neither the plaintiffs nor their members suffered any perceptible and judicially cognizable injury-in-fact, let alone any injury that could be redressed by the imposition of civil penalties. Mere exceedances of a permit, or the plaintiffs' "psychic

concerns" about those exceedances, do not ipso facto constitute injury-in-fact to satisfy the first of three prongs of Article III standing.

Furthermore, the court lacked jurisdiction to adjudicate this case because the plaintiffs lacked statutory standing to file it in the first place. The citizen suit provision of the Clean Water Act authorizes the filing of such suits only where the federal government or state authorities have not commenced and are not diligently prosecuting an action to require compliance. Here, the record indisputably shows that the South Carolina DHEC commenced an action to require compliance, and diligently prosecuted that action *before* the plaintiffs filed a duplicative suit in federal court. J.A. 72. Congress intended that citizen suits should supplement, not supplant, duplicate, or disrupt federal or state agency enforcement of the permits under the Clean Water Act.

In short, this seven-year old lawsuit appears to be less about a case of genuine citizen concern for the protection of the environment, and more about a case of a concern by a few national professional groups to continue exploiting the "citizen suit" provisions of the Clean Water Act for their personal benefit by reaping large attorneys fees awards, and by seeking excessive fines or extorting settlements against responsible companies which have demonstrated their commitment to meet, if not exceed, anti-pollution standards.

ARGUMENT

Even though the court of appeals deferred addressing the issues of statutory and constitutional standing, the petitioners' first question presented to this Court is expressly

premised on their assertion that they possessed standing not only when they filed the underlying action in 1992, but continue to suffer injury-in-fact to this day.[2] Accordingly, the issues of standing, both statutory and constitutional, are presented before this Court, or at least are "subsidiary question[s] fairly included" within the question presented. SUP. CT. R. 14.1(a).

But even if the questions presented did not expressly raise or implicate the standing issue, this Court has an independent duty to determine *sua sponte* whether the plaintiffs have standing and the case is live controversy throughout all successive stages of the litigation. *Juidice v. Vail*, 430 U.S. 327 (1977); *Preiser v. Newkirk*, 422 U.S. 395 (1975); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

Federal courts are courts of limited jurisdiction and the "obligation on the court to examine its own jurisdiction continues at each stage of the proceedings, even if no party

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[2] Petitioners' first Question Presented states:

> 1. Whether a citizen suit seeking civil penalties under Section 505 of the Clean Water Act is constitutionally moot under *Steel Co. v. Citizens for Better Environment*, 118 S. Ct. 1003 (1998), due to lack of redressability, *where plaintiffs had standing at the time of the complaint and have shown continuing injury-in-fact* but have not obtained injunctive relief.

Pet. for Cert. at i (emphasis added).

raises the jurisdictional issue and both parties are prepared to concede it." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 230 (1990); *Secretary of State of Maryland v. Joseph H. Munson, Co.*, 467 U.S. 947, 954, n.4 (1984). This Court has remarked that standing is "perhaps the most important" of jurisdictional doctrines. *FW/PBS Inc.*, 493 U.S. at 230, *quoting Allen v. Wright*, 468 U.S. 737, 750 (1984). In short, standing is a jurisdictional issue that can be raised at any time. *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986).

Accordingly, it is entirely appropriate for amici and Laidlaw to challenge FOE's statutory and constitutional standing in this Court just as it was appropriate to challenge it in the court below. Even if the reviewability of statutory standing is not on the same par as the reviewability of constitutional standing, this Court can nevertheless reach the issue, should it become necessary, because "[a] respondent is entitled * * * to defend the judgment on *any* ground supported by the record * * * ." *Bennett v. Spear*, 520 U.S. 154, 161 (1997) (emphasis added).

Because the record is sufficiently developed with respect to these standing issues, and because they are questions of law, this Court can resolve them and affirm the judgment of the court of appeals on either of those grounds.

I. PLAINTIFFS LACK ARTICLE III STANDING

Under the "Case" or "Controversy" provision of Article III of the Constitution, a party seeking to invoke the judicial power of the federal courts must meet three minimum requirements. "First and foremost, there must be an `injury in fact' -- a harm suffered by the plaintiff that is `concrete'

and `actual or imminent, not `conjectural' or `hypothetical.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). A `particularized' injury is one that "affect[s] the plaintiff in a personal and individual way." *Id.*

The plaintiff must make a "factual showing of *perceptible* harm." *Id.* (emphasis added). Standing, the Court emphasized, is not "an ingenious academic exercise in the conceivable." *Id.* Thus, a plaintiff has not suffered a legally cognizable injury where the alleged injury is based on "pure speculation." *Id.* at 567.

In addition to proving that they have suffered an injury in fact, the plaintiffs must show that the injury was caused by or is traceable to the "complained-of conduct of the defendant." *Steel Co. v. Citizens for a Better Env't*, 118 S. Ct. 1003, 1016-17 (1998). Finally, "there must be redressability -- a likelihood that the required relief will redress the alleged injury." *Id.* at 1017. The "party invoking federal jurisdiction bears the burden of establishing" all three elements of Article III standing. *Id.*

This Court has made it clear that the doctrine of standing is grounded in separation-of-power concerns that federal courts do not arrogate to themselves powers which properly belong to the two political branches of government. *Defenders*, 504 U.S. at 560. "As a jurisdictional prerequisite, standing prevents the federal courts from becoming forums for the `ventilation of public grievances' and protects the delicate balance of power shared by the executive, legislature, and judiciary." *Public Interest Research Group of New Jersey v. Magnesium Elektron, Inc.*, 123 F.3d 111, 117 (3d Cir. 1997).

A. Plaintiffs Have Not Satisfied the Injury-in-Fact Requirement of Standing.

In the case at bar, the plaintiffs allege that Laidlaw exceeded the mercury permit levels under its NPDES permit over several years based upon information readily obtained from the Daily Monitoring Reports (DMRs) required to be filed by Laidlaw with the EPA and South Carolina DHEC. But the "mere exceedance of a permit limit" is insufficient to show injury-in-fact for purposes of Article III. *See PIRGNJ v. Magnesium Elektron, Inc.*, 123 F.3d 111, 121 (3d Cir. 1997). Just because Congress authorized the filing of citizen suits (under limited circumstances) in federal court to enforce permits, that does not mean that mere violations of those permits ipso facto constitute the requisite injury-in-fact that must be alleged and proven by the preponderance of the evidence to satisfy Article III. Petitioner's amicus is wrong when it suggests that "Congress . . . defined the relevant `injury' as a `violation' of the applicable limitations." Brief of Americans for the Environment at 17.[3]

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[3] To use another example, assume Congress had enacted a law allowing citizen suits against those drivers who exceed the posted speed limits on interstate highways. Mere allegation by a plaintiff that a defendant exceeded the posted speed limit several times, or even a thousand times (for example, by traveling 56 miles per hour (mph) in a 55 mph zone), does not ipso facto translate into a perceptible, cognizable injury-in-fact to the plaintiff, even if the plaintiff drives on the same highway as the defendant. That is so because the plaintiff has not shown that he or she suffered any perceptible injury because the defendant exceeded the speed limit.

In setting acceptable levels of discharge for various pollutants, the EPA builds a margin of safety into the standard. Thus, even if the water quality were technically "harmed" by Laidlaw's exceedances, the plaintiffs must still prove that they -- and not just the water -- suffered perceptible rather than speculative or abstract harm from the excess discharge of mercury.[4]

In the instant case, the plaintiffs made "boilerplate" allegations of harm on behalf of themselves and their members. J.A. 30-36.[5] The allegations of institutional injuries centered around minor technical reporting and

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[4] Even petitioners' amici Natural Resources Defense Council, *et al.*, acknowledge this principle: "[I]t is the effect of the illegal mercury discharges on the plaintiffs, not the effect on the river, that is the focus of the Article III inquiry." Amici Br. of Natural Resources Defense Council, *et al.*, at 8, n.9. But if there is no effect on the river, *a fortiori*, there can be no effect on the plaintiffs. Mere "concerns" about the state of the quality of the environment are simply too abstract to confer standing under Article III. *Steel Co.*, 118 S. Ct. at 1019.

[5] All three plaintiff organizations filed suit "on behalf of [themselves] and [their] members." J.A. 30, 32, 34. However, Congress authorized the commencement of citizen suits only by a person "on his own behalf." 33 U.S.C. § 1365(a). Consequently, only the harm to the institutional interests of the three plaintiff organizations are properly the focus of whether they have suffered a cognizable and redressable injury in fact. *Cf. Steel Co. v. Citizens for a Better Environment*, 118 S. Ct. 1003, 1015, n. 6 (citizen suit provision authorizing suits by a plaintiff only "on his own behalf" arguably permits plaintiffs "to vindicate only its own interests as an organization, and not the interest of its individual members").

monitoring violations; and the allegations of environmental harm to the organizations' members were cast in vague and conclusory terms.[6]

While these vague and generalized grievances may have been sufficient to survive a motion to dismiss, this case was argued and tried on the merits. Consequently, the plaintiffs have the burden of proof and persuasion to demonstrate the existence of injury-in-fact and the other elements of standing throughout all stages of the proceedings. *Lujan v. Defenders of Wildlife*, 504 U.S. at 561.

Here, the plaintiffs not only failed to show that the excursions by Laidlaw harmed any aquatic life, the district court found the opposite: Laidlaw's discharges caused no harm to the environment. *Friends of the Earth v. Laidlaw Envt'l Servs.*, 956 F. Supp. 588, 600-02 (D.S.C. 1997).

For example, Laidlaw introduced the results of its nine years of semiannual acute and chronic toxicity tests, the results of a fish tissue study on bluegill sunfish in the North Tyger River, and the results of a second fish tissue study on large mouth bass and other species of fish in the River. Based on these tests, expert testimony, and the testimony of

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[6] The Complaint alleges that the "Defendant's discharge of pollutants in violation of its permit number SC0040517 has adversely affected, is adversely affecting, and will continue adversely to affect, the health, economic, recreational, aesthetic, and environmental interests of FOE's members." J.A. 31, ¶ 8. Essentially identical conclusory language was used to describe the so-called injury to the members of plaintiff Citizens Local Environmental Action Network, Inc. (J.A. 33, ¶ 12) and to the members of plaintiff Sierra Club (J.A. 35, ¶ 16).

various witnesses of the South Carolina DHEC, the court found that the water quality standard for mercury had been attained and that the overall quality of the river "exceeds levels necessary to support propagation of fish, shellfish, and wildlife, and recreation in and on the water." *Id.* at 600.

Specifically, the fish tissue studies both showed that levels of mercury in the sampled fish were well below the Food and Drug Administration action level of 1.0 milligram per kilogram of fish tissue examined. The DHEC fish study showed no mercury above the detection limit of 0.25 mg/kg, less than one quarter of the level necessary to trigger the FDA action level. The court further found that:

> Laidlaw's macroinvertebrate assessments, which were performed two times per year between 1986 and 1994, and 96-hour flow-through bioassays, which were also performed during this same time period, showed that prior mercury discharge limits as high as 20 ppb *had no adverse effect on the indigenous biological community in the North Tyger River downstream from Laidlaw's facility*.

Id. (emphasis added).

Under circumstances very similar to this case, the Third Circuit found that while the plaintiff organizations may have initially alleged sufficient harm to survive a motion to dismiss, they lacked standing where the trial court ultimately found that although the company in that case technically violated its NPDES permit, there was no harm to the environment. *PIRGNJ*, 123 F.3d 111 (3d Cir. 1997). The Third Circuit also rejected the plaintiffs' claim that their

mere knowledge of the technical violations by the company constituted sufficient injury-in-fact. *Id.* at 120-21.

Plaintiffs' alleged institutional interest in obtaining information required to be reported by Laidlaw was also not perceptibly affected by the technical monitoring and reporting violations. "Laidlaw's monitoring and reporting deficiencies, all of which have long since been resolved, produced no environmental impact. There has been no demonstrated proof of harm to the environment." 956 F. Supp. at 602. The court even found that, in proposing a penalty to the court, plaintiffs' use of the value range in EPA's Penalty Policy that was indicative of the least amount of health or environmental harm "constitutes an acknowledgment that the NPDES permit violations at issue in this citizen suit *did not result in any health risk or environmental harm.*" *Id.* (emphasis added). Most significantly, the violations "did not result in DHEC [or the plaintiffs] being misled or ignorant as to the type or extent of compliance difficulties Laidlaw was experiencing." *Id.*

The court in *PIRGNJ* also soundly rejected a similar argument made by the plaintiffs in that case that the monitoring and reporting violations caused sufficient injury-in-fact. The court reasoned that implicit in the argument that the plaintiff needed the information to enforce the Clean Water Act was the assumption that the company "posed a real threat to the environment." 123 F.3d at 124. Because the facts showed otherwise, and because the alleged injury was not redressable, the plaintiffs failed to establish standing

in that case. *Id.* at 124-25.[7] The same result show obtain here.

Recently, the Fourth Circuit similarly ruled in *Friends of the Earth v. Gaston Cooper Recycling Corp.*, ___ F.3d ____, 1999 U.S. App. LEXIS 11201 (4th Cir. June 2, 1999), that plaintiffs' allegations of injury were insufficient to confer standing. There was no showing in that case that the company's discharges caused environmental harm to the portion of the waterbody used by the plaintiffs; rather, the court concluded that the concerns of the plaintiffs about the quality of the waterbody was "based on mere speculation." *Id.*

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[7] Thus, the information injury alleged in this case is quite unlike the informational injury found by this Court to have existed in *Federal Election Comm'n v. Atkins*, 118 S. Ct. 1777 (1998). In *Atkins*, the plaintiffs alleged that the putative political committee was not filing *any* financial information with the FEC that would assist the plaintiff in evaluating candidates for public office. Similarly, the plaintiffs in *Public Citizen v. Department of Justice*, 490 U.S. 440, 449 (1989) alleged informational injury because the putative advisory committee failed to disclose *any* information otherwise required to be disclosed by the Federal Advisory Committee Act. In *Sierra Club v. Simpkins*, 847 F.3d 1109 (4th Cir. 1998), the company failed to file *any* discharge reports for over two years, and thus deprived plaintiffs and regulators of substantial information regarding harm to the environment.

In the case at bar, on the other hand, Laidlaw's reporting violations were technical and insignificant in nature, and caused no information injury to the plaintiffs. Indeed, the plaintiffs relied on Laidlaw's monitoring reports to file this lawsuit and presumably to inform its members about the water quality of North Tyger River.

Other courts have begun to take their constitutional duties seriously by closely examining the allegations of injury in environmental lawsuits, and if found wanting, have dismissed those cases for lack of standing. *See, e.g.*, *Informed Citizens United, Inc. v. USX Corp.*, 1999 WL 76266 (S.D. Tex. Feb. 9, 1999) (allegations that filling wetlands would interfere with plaintiff's wildlife viewing "falls far short" of establishing injury-in-fact); *Ogden Projects, Inc. v. New Morgan Landfill Co.*, 911 F. Supp. 863 (E.D. Pa. 1996) (plaintiffs failed to show how allegedly illegal air emissions adversely affect health, environment, and recreational interests).

B. Plaintiffs Have Failed to Demonstrate That Laidlaw Has Caused The Alleged Environmental Injuries To Their Members Which Can Be Redressed.

While it is true that the mercury exceedances were caused by Laidlaw, that does not necessarily mean that Laidlaw is the source of the environmental injury allegedly suffered by the plaintiffs' members. Concomitantly, if Laidlaw's mercury exceedances are not the source of the injury to plaintiffs' members, the injunctive relief requested in the Complaint would certainly not redress those injuries. As will be demonstrated, the plaintiffs failed to satisfy these second and third prongs of Article III standing.[8]

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[8] Amici agree with the court of appeals that the civil fines ultimately imposed by the district court do not redress plaintiffs' environmental injuries. 149 F.3d 303, 307 (4th Cir. 1998); *Steel Co.*, 118 S.Ct. at 1019. The argument that fines provide general deterrence to prevent violations by Laidlaw of its permit at *other* plants is putting the cart before the horse: the plaintiffs have not properly shown that Laidlaw has violated any of its other permits or that plaintiffs or their members have been injured if there were any such violations. The belated Affidavit of Bruce Terris, counsel for plaintiffs, to show otherwise is wholly conclusory, woefully inadequate, and not based on personal knowledge. *See* January 19, 1999 Affidavit of Bruce J. Terris, attached to Petitioners' Reply to Opp. Cert. at 33a. Properly viewed, the interest in general deterrence is one that is shared by the public at large. *Steel Co.* 118 S. Ct. at 1019; *Dubois v. U.S. Dep't of Agriculture*, 20 F. Supp.2d 263 (D.N.H. 1998).

We are told by the petitioners that they have members "who use or refrain from using the waterways affected by Laidlaw's discharge" of mercury above the permitted levels. Pet. Br. at 6. This statement, of course, tells us absolutely nothing about whether those who use the waterways are (or were) adversely affected by Laidlaw's discharge of mercury over and above the limit allowed by the NPDES permit, and whether those who refrain from using the waterways do (or did) so *because of* Laidlaw's intermittent exceedances.

We are next told that the plaintiffs' members:

> would like to picnic, birdwatch, and hike near, boat on, and eat fish from the North Tyger River and downstream waters but either do not do so or are *concerned* when they do so *because of the pollution in the River*. They are also *concerned* about the impact of that pollution on the value of their homes and on their dairy products because cows drink from the River.

Pet. Br. at 6 (citing to Affidavits). In the first place, it is highly questionable whether these are genuine interests possessed by these individual members, or whether they

were newly found and manufactured *after* this lawsuit was filed. *See generally* Hr'g Tr., June 30, 1993.[9]

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[9] During the hearing on the motion for summary judgment on the standing issue, counsel for Laidlaw pointed out to the court in some detail that the depositions of plaintiffs' affiants contradicted the boilerplate affidavits that had been drafted for them by the plaintiff organizations; at one point, counsel accused the plaintiffs' attorney of violating Rule 11. Hr'g Tr. at 31. According to Laidlaw's counsel, affiants Curtis and Moore, the two principal witnesses "either recanted or denied most what they said in their affidavit[s]" in their depositions. Hr'g Tr. at 3. For example, Mr. Curtis was asked in his deposition whether the reason he stopped visiting the river was because of the pollution. He answered "No." When asked whether he had any desire to go back to the river, he responded, "I haven't, no." *Id.* at 35.

Ms. Moore indicated in her affidavit that she "would like to use the North Tyger River" for "picnicking and other recreation" but is concerned that the River contains harmful pollutants. Moore Aff. ¶ 4. Yet she testified in her deposition that she had only been near the river once in 1980 when she was visiting a friend who happened to live near the river, and did not visit the river again until *after* this lawsuit was filed. Hr'g Tr. at 7. Ms. Moore further testified on direct that she did not have "any interest" in going to the North Tyger River prior to the filing of this lawsuit. *Id.* at 8. On cross-examination by plaintiffs' attorney, she speculated that she only "might" want to visit the river. *Id.* She also stated in her affidavit that she wanted to take her students to the river to study pollution. Hr'g Tr. at 36. But when she was deposed, she said she had not taken them there. *Id.* But even if Ms. Moore had taken her students on the trip, that obviously would not constitute an injury-in-fact because the goal of the trip was to see and study pollution.

Secondly, assuming that these interests are legitimate and not speculative ones as amici submit, the petitioners state in their brief that they do not engage in certain activities or do so with some concern "because of the pollution in the River." Pet. Br. at 6. Laidlaw's discharge of mercury above the permitted limits is certainly not the cause of all the "pollution" in the river, nor indeed, is the discharge any part of the pollution that impacts these alleged interests. For example, there is absolutely no showing by the plaintiffs that when Laidlaw exceeded its mercury discharge limit of 1.3 parts per billion by another part per billion or fraction thereof, the plaintiffs' members could not "picnic, birdwatch, or hike near," or "boat on" the North Tyger River, or that these activities were impaired in any perceptible manner.

There are other companies and entities in the geographical area which discharge pollutants into the North Tyger River. In addition, by plaintiffs' own admission, there are also farms and dairies nearby whose livestock use the river. Pet. Br. at 6 ("cows drink from the River"). EPA estimates that 65% of stream pollution is caused by unregulated nonpoint sources compared to 26% caused by municipal and industrial point sources combined. EPA, ENVIRONMENTAL PROGRESS AND CHALLENGE: EPA'S UPDATE 46 (1988). Thus, not only have the plaintiffs failed to show that Laidlaw is the source of their pollution concerns, they have failed to show that their concerns would be redressed by a favorable opinion. For example, Affiant Curtis claims in his affidavit that the North Tyger River "looks and smells polluted" (Curtis Aff. ¶ 3). Yet there was no showing that the trace levels of mercury from Laidlaw's facility contribute to water turbidity or produce

malodorous compounds to make the River "look and smell polluted."

Plaintiffs' members also express concern about eating fish from the River and drinking milk from a local dairy whose cows drink water from the River. In the first place, the record shows no environmental harm to fish from Laidlaw's discharges. The same can be said about the milk from cows who drink from the river. There is absolutely no proof that the retail fish and milk supplies in the area have been tainted by Laidlaw's mercury discharges, or that governmental health and safety procedures would not detect such levels before the products were shipped to market.

Secondly, the affiants suggest in their depositions that they buy their fish at the supermarket, and prior to the filing of this lawsuit, they had no concern about where the fish came from. Hr'g Tr. 19. But even assuming that the plaintiffs' members would refrain from drinking milk or eating fish that came from the river because of the presence of mercury, that injury cannot be redressed by a favorable ruling because Laidlaw is permitted to discharge mercury, albeit up to a limit, into the river. Thus, the plaintiffs would apparently continue to avoid or be "concerned" about eating fish or drinking milk because of the presence of even lawful amounts of mercury in the River.

Even if it could be demonstrated that Laidlaw contributed in some minute way to the pollution in the North Tyger River, plaintiffs would not have satisfied the redressability prong of standing because there was no showing that the water quality would improve in any

perceptible degree to remedy affiants' so-called injuries, psychological or otherwise.[10]

Despite the fact that Laidlaw's discharges caused no environmental harm, that the "overall quality of the river exceed levels necessary to support propagation of fish, shellfish, and wildlife, and recreation in and on the water" (956 F. Supp. 600), and that Laidlaw has long ceased operating the facility, the plaintiffs are nevertheless claiming that they are still suffering an injury in fact to this very day. Pet. Cert. at i. Clearly, these continuous "injuries" were and are being caused by sources other than Laidlaw, and are not redressable by a ruling against Laidlaw.

In short, plaintiffs have failed to satisfy any of the three prongs of standing under Article III. The failure to satisfy any one of them necessitates the dismissal of this case for lack of jurisdiction.

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[10] In that regard, the plurality opinion in *Defenders* on this issue is instructive. There, the government contributed only "10% of the funding for the Mahaweli Project" alleged by plaintiffs to be harmful to endangered species; but the plaintiffs "have produced nothing to indicate that the projects they have named will either be suspended, or do less harm to listed species, if that fraction is eliminated * * * * There is no standing." 504 U.S. at 571. In the instant case, because there was no showing that plaintiffs' so-called injuries from all of the pollution in the river were attributable to Laidlaw's intermittent mercury exceedances, there can be no showing of redressability.

II. PLAINTIFFS LACK STATUTORY STANDING

Section 505(b)(1) of the Clean Water Act states that "[n]o action may be commenced * * * if the [EPA] Administrator or State has commenced and is diligently prosecuting a civil * * * action in a court of the United States, or a State to require compliance with the standard, limitation, or order * * * ." 33 U.S.C. § 1365(b)(1). Congress enacted this provision recognizing the primary role of the appropriate governmental agencies to enforce the Clean Water Act, and to prevent potentially intrusive citizens suits. *See Gwaltney of Smithfield v. Chesapeake Bay Found.*, 484 U.S. 49, 60-61 (1987).

To be sure, this Court in *Steel Co.*, made it clear that the Court must first determine whether it has Article III jurisdiction before it addresses a merits question. *Steel Co.* 118 S. Ct. at 1010-12. In doing so, the Court rejected the "doctrine of hypothetical jurisdiction" whereby jurisdiction is assumed to reach a merits question, the resolution of which would also result in dismissal of the suit. "We decline to endorse such an approach because it carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers." *Id.* at 1012.

In response to Justice Stevens concurring opinion in *Steel Co.* that a statutory standing question can be adjudicated before difficult the constitutional question, the majority countered that the issue Justice Stevens would address was not a statutory standing question, *i.e.*, "whether EPCRA authorized this plaintiff to sue (it assuredly does), but whether the scope of the EPCRA right of action includes

past violations." *Id.* at 1011. The Court opined that that was a merits question, not a jurisdictional one. *Id.*

In the case at bar, however, federal courts are not authorized to entertain citizen suits unless the federal government or state agency has not commenced and is not diligently prosecuting a civil or criminal case. Thus, in certain respects, this provision appears to be a statutory standing question: does the citizen suit provision allow *these* plaintiffs to file a citizen suit in federal court where State authorities have commenced and have diligently prosecuted an action?

It is clear from the record in this case that South Carolina DHEC commenced and diligently prosecuted a civil action against Laidlaw. J.A. 72. Yet the district court erroneously concluded that the *results* obtained by state authorities in its enforcement action, namely the amount of civil penalties, were not considered to be severe enough, and that private parties such as the plaintiffs were given little chance to intervene in the exercise of the State's executive power. J.A. 118. Amici submit, however, that the severity of the judgment -- whether entered as a consent order or by a state court after a trial -- or the existence of opportunities for intervention by private parties in the state enforcement action, does not mean, as a matter of law, that the State did not diligently prosecute the action.

While lower court decisions have interpreted the meaning of "civil or criminal action" narrowly, for example, by ruling that citizen suits are not precluded while *administrative* rather than court actions have been

undertaken,[11] nothing in the statute or any regulation requires that certain levels of punishment or relief be obtained by federal or state authorities to be determinative of whether a prosecution of an action has been diligent or not. If anything, the filing of the complaint and consent order by state authorities within a few days of each other shows that the agency was *super* diligent in prosecuting the action, rather than dilatory.[12]

Accordingly, it is clear that an action was commenced and diligently prosecuted before the plaintiffs filed their suit. For these reasons, this Court can affirm the court of appeals on this statutory jurisdictional ground as well.

III. THE PUBLIC INTEREST IS NOT SERVED BY CITIZEN SUITS SUCH AS THIS ONE

While Congress provided for citizen suits in the Clean Water Act as well as in many other environmental statutes, Congress did not intend that they would generate disruptive and needless litigation by professional interest groups more concerned with their attorneys' fees and the exaction of fines than genuine environmental protection. In the view of many observers, "citizen suits border[] on extortion and allow[] environmentalists to maintain suits for technical violations

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[11] *See, e.g., Washington Area Pub. Interest Research Group v. Pendleton Woolen Mills*, 11 F.3d 883 (9th Cir. 1993).

[12] It is common practice for agencies such as the Securities and Exchange Commission, the Federal Trade Commission, and similar law enforcement agencies to file simultaneously a lawsuit against a defendant and a consent judgment for entry by the court.

so trivial that they had not warranted governmental enforcement." Richard Lazarus, *Rise and Demise of the Citizen Suit*, 15 Envtl Forum, No. 5 at 8 (Sept.-Oct. 1998).

One commentator astutely concluded that the "real purpose and effect of citizen suits is not efficient law enforcement but the subsidization of political constituencies * * *." Michael Greve, *The Private Enforcement of Environmental Law*, 65 Tulane L. Rev. 339, 392 (1990). Most of the citizen suits are brought by a "cartel" of professional environmentalist groups that take "less than a half-day * * * to train student volunteers to scan [the company's] DMRs and identify infractions." *Id.* at 354. Notice of Intent to Sue letters are fired off, and companies are pressured into "settling" for minor or technical violations which otherwise would be subjected to excessively high statutory penalties. Laidlaw's commitment to defend itself rather than settle is the exception, not the rule.

The Clean Water Act in particular, in contrast to most citizen suit environmental statutes, allows the private plaintiff to seek not only injunctive relief, but civil fines as well. 33 U.S.C. § 1365(a). While this enforcement power raises serious separation of powers concerns, the motivation to obtain large fines for the U.S. Treasury is not necessarily altruistic:

> Economically speaking, the requirement that all fines be paid to the Treasury is a 100% tax on the private enforcer's recovery. Taxation creates a differential between the enforcer's expected gain from enforcement and the violator's expected loss from enforcement. This, in turn, means that "both the apprehended offender and the enforcer would be better

off if they negotiated a private transfer payment that was less than the statutory fine but greater than the fine minus the tax."

Id. at 357 (*quoting* RICHARD POSNER, THE ECONOMIC ANALYSIS OF LAW 561 (3d ed. 1986)).

An objective review of the actions that Laidlaw undertook to limit its mercury discharge indicates that the company was a model of corporate responsibility. The district court's finding that Laidlaw's infractions caused no environmental harm and the plaintiffs' last-minute scramble to find "injured" members speaks volumes about the interests that are really at stake in this citizen suit. If the plaintiffs insist on calling upon the federal courts to devote their scarce judicial resources to adjudicate these kinds of cases, this Court should scrupulously insist that these groups are properly invoking the court's power.

CONCLUSION

For the foregoing reasons, and those provided in Laidlaw's brief, amici curiae urge this Court to affirm the judgment below, and to remand this case to the court of appeals with directions to vacate the district court judgment.

Respectfully submitted.

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Date: July 19, 1999

FILED
JUL 19 1999
OFFICE OF THE CLERK

No. 98-822

(21)

IN THE

Supreme Court of the United States

FRIENDS OF THE EARTH, *et al.*,

Petitioners,

v.

LAIDLAW ENVIRONMENTAL SERVICES (TOC), INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF *AMICUS CURIAE* OF HERCULES INCORPORATED IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST[1]

Amicus curiae, Hercules Incorporated ("Hercules"), is currently a defendant in a case pending in the United States District Court for the District of New Jersey that has been described as "indistinguishable" from the case before this Court. The background of Hercules' case is discussed in *Public Interest Research Group of New Jersey, Inc. v. Hercules, Inc.,* 50 F.3d 1239 (3d Cir. 1995), and *Public Interest Research Group of New Jersey, Inc. v. Hercules, Inc.,* 830 F. Supp. 1525 (D.N.J. 1993). The Hercules case was tried before the Honorable Jerome B. Simandle beginning in February 1997. While the trial court's decision was pending, the decisions in *Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 118 S. Ct. 1003 (1998), and *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.,* 149 F.3d 303 (4th Cir. 1998), *cert. granted,* 119 S. Ct. 1111 (March 1, 1999) (No. 98-822), were rendered. Hercules filed a motion to dismiss based on these decisions which was briefed and then argued in February 1999. On March 31, 1999, the trial court issued an Order for Administrative Termination of the case pending the decision in this appeal. The trial court noted "that the factual and procedural circumstances relating to redressability [in the Hercules] case are indistinguishable from . . . *Laidlaw* . . ." and further stated "because the Supreme Court will soon be determining whether the finding of mootness in *Laidlaw* was correct, it appears that the wisest course is to defer ruling upon this complex issue, or reaching the merits of this case, until the Supreme Court speaks in *Laidlaw* . . . ." Order for Administrative Termination at 1-2 (footnote omitted) (Herc. App.

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1. Counsel for the parties have consented to the filing of this *amicus* brief, and the letters of consent are being filed with this Court. No counsel for a party in this case authored this brief in whole or in part, other than *amicus* or its counsel, and no person or entity, other than *amicus* or its counsel, made a monetary contribution to this brief's preparation or submission, pursuant to Supreme Court Rule 37.

1-2a).[2] Consequently, Hercules has a direct interest in the outcome of the Laidlaw appeal.

SUMMARY OF ARGUMENT

The Fourth Circuit Court of Appeals' decision in *Laidlaw* correctly decided that the disposition of this case is controlled by *Steel Co.* Accordingly, the *Laidlaw* decision should be affirmed. *Steel Co.* ruled that constitutional standing does not exist where effectively the only relief sought by a citizen plaintiff is civil penalties payable to the United States Treasury. This is precisely the situation that exists here since the Petitioners' request for an injunction was denied. It is of no moment that when their complaint was filed, the Petitioners satisfied the "alleged to be in violation" statutory jurisdictional requirement discussed in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987). It is well settled that post-complaint events can moot a case. Citizen suits are not exempt from the body of case law that demands that a plaintiff meet all the elements of constitutional standing at all stages of a lawsuit. If standing requirements are not met because of post-complaint events, then the case must be dismissed.

The *Gwaltney* decision anticipated a fact scenario identical to *Laidlaw* and discussed that, when presented with those circumstances, the case should be dismissed. The mootness discussion in *Gwaltney* would not have been included as part of the Court's opinion unless this Court recognized that post-complaint events could moot a citizen suit under the Clean Water Act. The fact that this Court remanded *Gwaltney* to the Fourth Circuit is irrelevant to the issues now before this Court. The Supreme Court could not decide the constitutional standing question because the lower court never developed the necessary factual record.

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2. The complaint against Hercules was filed on May 24, 1989, the last permit violation occurred on August 9, 1990, the trial court denied the plaintiffs' request for injunctive relief on March 31, 1993, and the trial court entered summary judgment for Hercules on the plaintiffs' injunction claim on July 28, 1993. *See PIRG v. Hercules, supra,* and Herc. App. 4-5a.

Moreover, the Fourth Circuit properly dismissed the Petitioners' claims because a citizen cannot obtain civil penalties after its injunctive relief claim is denied. The connection between civil penalties and injunctions in citizen suits is evidenced by the language of the Clean Water Act and this Court's *Gwaltney* opinion. The dismissal of Petitioners' case, after their injunction claim was denied, is consistent with the supplementary enforcement role envisioned for citizen plaintiffs. In the absence of a necessity to compel permit compliance, citizen plaintiffs play no effective role, and any relief they request will not "redress" their alleged injuries. The litany of horrors that Petitioners predict will occur if the dismissal of their complaint is affirmed will not occur and, in any event, do not usurp constitutional standing requirements and limits put on citizen suits in the Clean Water Act. Trial courts are well-equipped to avoid and deter intentional delaying tactics and can certainly recognize, address, and cure insincere attempts at permit compliance.

Lastly, Petitioners' request for declaratory relief does not provide them with the requisite redressability. As set out in *Steel Co.*, a declaration of liability as to a past violation is worthless. A request for useless relief cannot bootstrap a citizen plaintiff back into court when its request for injunctive relief is denied.

ARGUMENT

I. PETITIONERS' CASE MUST BE DISMISSED AS MOOT BECAUSE THE ONLY RELIEF THEY COULD BE AWARDED IS CIVIL PENALTIES PAYABLE TO THE UNITED STATES TREASURY.

A. The *Steel Co.* Decision Controls the Disposition of This Case.

1. All elements of constitutional standing must be met at all stages of a lawsuit.

This Court's decision in *Steel Co.* examined the same constitutional issue presented in this appeal and controls the disposition of the case. Constitutional standing requires a

plaintiff to sue over justiciable disputes and must be present at every stage of a lawsuit.[3] If constitutional standing is established, then plaintiffs seeking recourse under a specific statute are also required to prove the standing elements set forth in the statute. The Fourth Circuit recognized this distinction and properly dismissed the Petitioners' case based on post-complaint events that deprived the court of constitutional jurisdiction, even though when the complaint was filed the Petitioners satisfied the *Gwaltney* "to be in violation" requirement. Any other ruling would conflict with *Steel Co.* and decades of case law analyzing subject matter jurisdiction.

Article III, §2 of the Constitution limits the "judicial Power" of the United States to cases where a plaintiff has "standing" to sue. *Whitmore v. Arkansas,* 495 U.S. 149, 155 (1990); *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 559-60 (1992). This "irreducible constitutional minimum of standing" contains three elements: (1) the plaintiff must have suffered an injury in fact; (2) there must be a causal connection between the plaintiff's alleged injury and the complained-of conduct; and (3) there must also be "redressability," defined as a likelihood that the requested relief will redress the alleged injury. *Steel Co.,* 118 S. Ct. at 1017; *Lujan,* 504 U.S. at 560; *Simon v. Eastern Ky. Welfare Rights Org.,* 426 U.S. 26, 41-42 (1976); *Warth v. Seldin,* 422 U.S. 490, 505 (1975).

Further, standing is not a remote or stale concept to be evaluated once, and thereafter forgotten. Standing must be met at the time the complaint is filed and throughout the course of the case, at least through trial. *Arizonans for Official English v. Arizona,* 520 U.S. 43, 117 S. Ct. 1055, 1068 (1997). As the Fourth Circuit recognized below, this Court, in *United States Parole Commission v. Geraghty,* 445 U.S. 388, 397 (1980), explained mootness as "the doctrine of standing set in a time frame: The requisite personal interest that must

3. Statutory standing examines whether a plaintiff has a cause of action under the specific law being sued upon, *i.e.,* is the plaintiff within that statute's "zone of interests." *Steel Co.,* 118 S. Ct. at 1013 (citing *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers,* 414 U.S. 453, 465 (1974)). Constitutional standing, on the other hand, examines if there is a case or controversy under Article III of the Constitution. *Id.* at 1013.

exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Accord Church of Scientology of Cal. v. United States,* 506 U.S. 9, 12 (1992).

It is the third prong of the standing test, redressability, which is at issue in this appeal. The *Steel Co.* decision squarely addressed the redressability issue and ruled that this requirement is not satisfied when civil penalties and attorney's fees are effectively the only forms of relief a plaintiff is seeking. Since Petitioners' other potential forms of redressable relief became moot during the pendency of the litigation, *Steel Co.* demands that Petitioners' case be dismissed.

2. The *Steel Co.* decision held that civil penalties alone are not sufficient to satisfy the redressability element of standing.

In *Steel Co.,* this Court reversed the Seventh Circuit's decision, which had allowed a citizen group to sue for past failures to report its toxic chemicals inventory, based upon the citizen suit provision of the Emergency Planning and Community Right-To-Know Act, 42 U.S.C. § 11046 ("EPCRA"). In ruling that those citizen-plaintiffs did not have standing, this Court reached an important and significant conclusion for citizen suit plaintiffs: if the only effective relief that may be awarded is civil penalties and attorney's fees, Article III jurisdiction is lacking.

Steel Co. could not be clearer that civil penalties, such as those requested by Petitioners here, do not support redressability under Article III:

> [T]he civil penalties authorized by the statute [EPCRA] might be viewed as a sort of compensation or redress to respondent if they were payable to respondent. But they are not. These penalties – the only damages authorized by EPCRA – are payable to the United States Treasury. . . . By the mere bringing of his suit, *every* plaintiff demonstrates his belief that a favorable judgment will make him happier. But although a suitor may derive great comfort and joy from the fact that the United States Trea-

> sury is not cheated, that a wrongdoer gets his just deserts, or that the nation's laws are faithfully enforced, that psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury. . . . Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement.

118 S. Ct. at 1018-19 (citations omitted) (emphasis in original).

Similarly, *Steel Co.* held that a request for attorney's fees, such as demanded by Petitioners here, does not create standing:

> Obviously . . . a plaintiff cannot achieve standing to litigate a substantive issue by bringing suit for the cost of bringing suit. The litigation must give the plaintiff some other benefit besides reimbursement of costs that are a byproduct of the litigation itself. An "interest in attorney's fees is . . . insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim."

118 S. Ct. at 1019 (quoting *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 480 (1990) (citing *Diamond v. Charles*, 476 U.S. 54, 70-71 (1986))). *Steel Co.* then proceeded to dismiss the plaintiff's action because the other forms of relief requested, declaratory and injunctive, were not available to the plaintiff. Simply put, *Steel Co.* plainly established that if the relief requested by a citizen plaintiff does not redress its alleged injuries, in that case civil penalties and attorney's fees, the case must be dismissed.

The *Steel Co.* decision is controlling. Just as in *Steel Co.*, the Fourth Circuit in *Laidlaw* examined the relief sought and found that no standing existed because the following were lacking at the time of trial: (1) a continuing violation, (2) an imminent threat of a violation, and (3) damages suffered by plaintiff, beyond solely litigation costs and a request for civil penalties (*i.e.*, some other "costs" recoverable by statute). *See Steel Co.*, 118 S. Ct. at 1018-20. Because Petitioners are merely presenting claims for civil penalties and attorney's fees, *Steel Co.* mandates that the case be dismissed. The fact that Petitioners may have had redressable claims when they filed their complaint does not remove the requirement that standing be maintained during all stages of a case.

3. The fact that the plaintiff in *Steel Co.* did not allege an ongoing violation in its complaint is not legally significant to the disposition of this appeal.

Petitioners argue that *Steel Co.* is limited to selected citizen suits where no allegation of an ongoing violation is made at the time a complaint is filed. (Pet'r Br. at 19-21.) Yet, a comparison of the facts in *Steel Co.* to those in this case reveals no legally significant distinctions. The logic and reasoning of *Steel Co.*, when combined with the traditional and longstanding doctrine of mootness, dictate that the Fourth Circuit's decision be affirmed.

The essence of the *Steel Co.* holding is straightforward – civil penalties and attorney's fees, in and of themselves, do not supply the necessary redressability to support Article III standing to sue. Moreover, mootness, as noted above, is "standing set in a time frame." *Geraghty*, 445 U.S. at 397. Thus, each of standing's three elements must exist at every stage of a case. *Arizonans for Official English*, 117 S. Ct. at 1068. When these principles are examined in the context of the *Steel Co.* decision, an inescapable conclusion is reached. If at some point in a case a citizen plaintiff loses its redressability, that plaintiff has lost its standing to maintain the litigation, and the entire dispute, including any right to civil penalties or attorney's fees, has become moot.

The fact that Petitioners had redressable injuries at the commencement of the case, whereas the *Steel Co.* plaintiff did not, is not legally significant. Just as subsequent events that change a plaintiff's injury-in-fact can moot a case, subsequent events which oust a plaintiff of redressable claims can also moot a case. There is no logical rationale or case support offered by Petitioners to support their argument that redressability, unlike the other two prongs of standing, need only be met at the time a complaint is filed.

Petitioners attempt to distinguish *Steel Co.* by arguing that "the determining factor in *Steel Co.* was the plaintiff's inability to make and prove an allegation of continuing violation at the time of the complaint." (Pet'r Br. at 20.) Yet, the exact language cited by Petitioners for that proposition actually supports an opposite holding:

> *If respondent had alleged a continuing violation or the imminence of a future violation, the injunctive relief requested would remedy that alleged harm.* But there is no such allegation here – and on the facts of the case, there seems no basis for it.

(Pet'r Br. at 19-20) (quoting *Steel Co.*, 118 S. Ct. at 1019) (emphasis in original). Contrary to Petitioners' interpretation, when this Court referred to the absence of an allegation of an ongoing violation, it was merely explaining why injunctive relief was not available under the facts of the case before it. Nothing in this Court's language suggests that the doctrine of mootness be eviscerated once a continuing violation is shown at the start of a case.[4]

Petitioners here sought injunctive relief in their complaint. Yet, mere allegations in complaints do not control constitutional requirements. Rather, mootness requires an examination of the requested relief at every stage of a case. Here, because of post-complaint events, there is no longer a viable claim for injunctive relief. The only remaining items of substantive relief requested are for civil penalties and attorney's fees, which *Steel Co.* clearly and directly decided are not sufficient to satisfy Article III standing.

The factual differences between *Steel Co.* and this case only had significance prior to the time that Petitioners' claims became moot. In other words, Petitioners' injuries were redressable, and thus still "live" for mootness purposes, during

4. Moreover, this argument ignores the procedural history of *Steel Co.*, where this Court faced the standing issue at the motion to dismiss stage, not following trial as occurred here. *See Steel Co.*, 118 S. Ct. at 1017. Obviously, this Court in *Steel Co.* had no reason to examine post-complaint events because standing was lacking when the complaint was filed.

the time when injunctive relief was available. However, after their request for an injunction was denied, Petitioners lost their standing to maintain this litigation. Any other ruling would be in direct conflict with *Steel Co.*

4. Future deterrence of potential Clean Water Act violations does not satisfy the redressability element of standing.

Petitioners attempt an "end run" around *Steel Co.*, and thereby avoid Article-III based redressability requirements, by citing to the deterrent effect of civil penalties imposed on violators of the Clean Water Act, 33 U.S.C. § 1251, *et seq.* (Pet'r Br. at 24-29.) Yet, no matter how often Petitioners cite to deterrence, they cannot overcome the unqualified conclusion of *Steel Co.* that in the absence of a valid injunctive relief claim deterrence alone does not satisfy the redressability prong of constitutional standing. Moreover, whatever Congress' intent may have been in allowing for civil penalties, Article III jurisdiction must still be proven before penalties can be awarded.

Steel Co. faced the same argument raised by Petitioners here, that deterrence is enough to satisfy redressability, and rejected it outright. After noting that civil penalties are payable to the United States Treasury, and not to the plaintiffs, the Court held:

> In requesting [civil penalties], respondent seeks not remediation of its own injury – reimbursement for the costs it incurred as a result of the late filing – but vindication of the rule of law – the "undifferentiated public interest" in the faithful execution of EPCRA. . . . This does not suffice. Justice Stevens [in His concurring opinion] thinks it is enough that respondent will be gratified by seeing petitioner punished for its infractions and that *the punishment will deter the risk of future harm.* . . . If that were so, our holdings in *Linda R. S. v. Richard D.*, 410 U.S. 614 . . . (1973), and *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26 . . . (1976), are

> inexplicable. Obviously, such a principle would make the redressability requirement vanish.

118 S. Ct. at 1018 (emphasis added) (internal citations omitted). This Court's clear language could not make this principle more settled and established.

In addition, *Steel Co.* makes no differentiation or distinction, as Petitioners argue, based upon when the allegations of ongoing violations are made. (Pet'r Br. at 21.) To the contrary, this Court in *Steel Co.* emphasized that remedies which do not flow to the citizen plaintiff cannot provide the requisite redressability. *See Steel Co.*, 118 S. Ct. at 1019 (the fact that a "wrongdoer gets his just deserts," or that a plaintiff receives "psychic satisfaction" from a result, "is not an acceptable Article III remedy"). Accordingly, even accepting Petitioners' alleged "common sense" proposition that civil penalties deter potential water polluters, (*see* Pet'r Br. at 28), this does not override the absence of an acceptable Article III injury. Despite Petitioners' protestations to the contrary, a generalized interest in deterrence does not act as a substitute for a concrete, redressable Article III injury.

B. *Gwaltney* Contemplated a Case Such as This That Could Be Mooted Even Where the Requirements of Statutory Jurisdiction Were Met When the Case Was Filed.

The *Laidlaw* decision is in complete accord with *Gwaltney* and is not, as Petitioners argue, in "direct conflict." (Pet'r Br. at 9.) *Gwaltney* plainly indicates that post-complaint events can moot a citizen suit. Indeed, *Gwaltney* anticipated the fact scenario presented in this appeal and discussed how "[l]ongstanding principles of mootness ... prevent the maintenance of suit when there is no reasonable expectation that the wrong will be repeated." 484 U.S. at 66 (internal quotation marks omitted).

Although *Gwaltney* primarily addressed the "to be in violation" language of §505(a) of the Clean Water Act, 33 U.S.C.

§ 1365(a),[5] it also had occasion to discuss what happens if the "allegations of ongoing noncompliance become false *at some later point* in the litigation because the defendant begins to comply with the Act, ..." *Id.* (emphasis added). When it answered this question, this Court stated that the mootness doctrine "protects defendants from the maintenance of suit under the Clean Water Act based solely on violations wholly unconnected to any present or future wrongdoing, ..." *Id.* at 66-67. It is evident from this language that this Court anticipated that post-complaint events could moot a citizen's claim against a defendant, even though the defendant was "in violation" of its permit at the time the complaint was filed. Unless this were true, this Court would not have referred to "some later point in the litigation" in its mootness discussion. *Id.* at 66. The "point" of reference referred to by this Court was the date the complaint was filed. The "later point" could only have referred to post-complaint events.

Moreover, the *Gwaltney* decision stated that the mootness doctrine "protects defendants from the *maintenance* of suit." *Id.* at 66-67 (emphasis added). This evidences that the *Gwaltney* Court intended that post-complaint events could moot a case. "To maintain a suit is to uphold, continue on foot and keep from collapse a suit already begun." *Smallwood v. Gallardo*, 275 U.S. 56, 61 (1927); *George Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 377 (1933). When this Court indicated that defendants would be "protected" from the "maintenance" of suit, the Court acknowledged that a citizen suit should be dis-

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5. Section 505(a), as codified, 33 U.S.C. § 1365(a), provides in pertinent part:

> Except as provided in subsection (b) of this section and section 1319(g)(6) of this title, any citizen may commence a civil action on his own behalf –
>
> (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, ...

missed as moot even though the complaint satisfied jurisdictional requirements when filed.

C. The *Laidlaw* Ruling Furthers the Supplemental Role Envisioned for Citizens in Enforcement Litigation.

Petitioners argue that if violations or the risk of violations exist at the time a complaint is filed, a case can never become moot.[6] The fact that the Petitioners are wrong is demonstrated by the mootness discussion in *Gwaltney*. Moreover, Petitioners ignore the role envisioned for citizen plaintiffs in enforcement litigation, and how the outcome in *Laidlaw* is completely consistent with this role.

Gwaltney discussed the role citizens serve in enforcement litigation and focused on the abatement of pollution when the government cannot or will not command compliance. 484 U.S. at 61. If a defendant such as Laidlaw is not violating its permit, such that no injunction is necessary to compel compliance, there is no longer a role for the citizen plaintiff to play. Thus, the continuation of a suit, once it is clear compliance has been achieved, is not necessary. Simply put, the "supplementary role envisioned for this citizen suit," *id.* at 60, will have been satisfied once compliance is achieved. The dismissal of cases that become moot based on post-complaint events strikes "a balance between encouraging citizen enforcement of environmental regulations and avoiding burdening the federal courts with excessive numbers of citizen suits." *Hallstrom v. Tillamook County,* 493 U.S. 20, 29 (1989), *reh'g denied,* 493 U.S. 1037 (1990).

Petitioners also ignore the fact there is a recognized connection between a citizen's request for civil penalties and

6. Petitioners' Brief states:

> *Steel Co.* indicates that a citizen plaintiff has standing throughout a case regardless of whether the violations cease as long as the violations were continuing at the time of the complaint or at least that there was a risk that such violations were continuing at the time of the complaint.

(Pet'r Br. at 19.)

injunctive relief, such that a citizen cannot obtain civil penalties in the absence of an injunction.[7] In *Gwaltney*, this Court stated:

> In contrast, §505 of the Act does not authorize civil penalties separately from injunctive relief; rather, the two forms of relief are referred to in the same subsection, even in the same sentence. 33 U.S.C. §1365(a). The citizen suit provision suggests a connection between injunctive relief and civil penalties that is noticeably absent from the provision authorizing agency enforcement. *A comparison of §309 and §505 thus supports rather than refutes our conclusion that citizens, unlike the Administrator, may seek civil penalties only in a suit brought to enjoin or otherwise abate an ongoing violation.*

484 U.S. at 58-59 (emphasis added).[8] Furthermore, in discussing the legislative history of the Clean Water Act, this Court referred to the fact that "[m]embers of Congress frequently characterized the citizen suit provisions as 'abatement' provi-

7. Petitioners argue:

> This Court's holding on the statutory jurisdictional issue in *Gwaltney* further shows that injunctive relief is not a *sine qua non* to civil penalty relief in a citizen suit. This Court held that "citizens *** may seek civil penalties only in a suit brought to *enjoin or otherwise abate an ongoing violation*" (emphasis added). 484 U.S. at 59. The emphasized language, which is stated in the disjunctive, shows that civil penalties are available in a citizen suit when injunctive relief is not.

(Pet'r Br. at 16) (emphasis in original).

8. The use of the term "enjoin or otherwise abate" in the middle of this Court's discussion that "§505 of the Act does not authorize civil penalties separately from injunctive relief," 484 U.S. at 58, does not support Petitioners' argument that "civil penalties are available in a citizen suit when injunctive relief is not." (Pet'r Br. at 16.) This Court plainly was referring to an injunction either to stop an operation or to bring it into permit compliance. Enjoin is defined as "To require; command; positively direct. To require a person, by writ of injunction, to perform, or to abstain or desist from, some act." *Black's Law Dictionary* 529 (6th ed. 1990). Abate is defined as "To bring down entirely or demolish, to put an end to, to do away with, to nullify, to make void." *Id.* at 4.

sions or as injunctive measures." *Id.* at 61. In addition, this Court stated, "[m]oreover, both the Senate and House Reports explicitly connected §505 to the citizen suit provisions authorized by the Clean Air Act, which are wholly injunctive in nature." *Id.* at 62. This discussion evidences the plain connection between injunctive relief and civil penalties. Legislative history and prior precedent support the *Laidlaw* holding that a citizen cannot obtain civil penalties unless injunctive relief is awarded.

If *Laidlaw* is affirmed, there is no legitimate risk that the parade of horribles Petitioners predict will occur will in fact take place.[9] Moreover, Petitioners grossly overstate the impact if *Laidlaw* is affirmed.[10] Trial courts are well equipped to recognize, handle, and sanction dilatory practices. Furthermore, it will be the exception rather than the rule that cases will be dismissed as moot. *Gwaltney* plainly noted that a defendant's burden to demonstrate mootness "is a heavy one." *Id.* at 66 (quoting *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953)). In addition, the "general rule" is that voluntary cessation of illegal conduct does not make a case moot. *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979). Courts are well aware of their duty "to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption." *W. T. Grant Co.*, 345 U.S. at 632

9. Petitioners argue:

> Moreover, the wasting of time and resources could become a vicious circle if a case were easily dismissed due to the voluntary cessation of the illegal conduct. In such circumstances, defendants would be free to resume illegal conduct, cease such conduct during suit to avoid the consequences of the suit, resume the illegal conduct when the case was dismissed as moot, and so on.

(Pet'r Br. at 23.) Petitioners also argue, "The court of appeals' decision eviscerates the citizen suit provision of the Water Act and creates perverse incentives that encourage violation of the Act and dilatory litigation practices." (Pet'r Br. at 36.)

10. Petitioners argue that *Laidlaw* "requires ... the dismissal of any citizen suit brought against a party that has violated a federal environmental law as long as that party comes into compliance prior to final judgment." (Pet'r Br. at 10.)

(quoting *United States v. Oregon State Med. Soc'y*, 344 U.S. 326, 333 (1952)). Ample authority exists to protect a citizen plaintiff from the "suddenly repentant defendant." *See Gwaltney*, 484 U.S. at 66-67.[11]

The same public policy arguments Petitioners make here can be raised in any case when a defendant asserts a mootness defense based on post-complaint events. Nevertheless, if the mootness standard is met, courts have dismissed cases based on a defendant's cessation of illegal activities and the prediction that the illegal conduct will not continue. *See Preiser v. Newkirk*, 422 U.S. 395 (1975). *See also Sperry v. Florida*, 373 U.S. 379, 383 n.1 (1963) (petitioner's right to refer to himself as a "Patent Attorney" mooted by his voluntary discontinuance of use of that term); *Davis, supra.* These cases recognize that "jurisdiction, properly acquired, may abate if the case becomes moot ...." *Id.* at 631. This, of course, is consistent with the rule in federal cases "that an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Preiser v. Newkirk*, 422 U.S. at 401 (citations omitted).

D. *Gwaltney* Does Not Support Petitioners.

Petitioners argue that *Gwaltney* is binding precedent based on certain factual similarities between the two cases. However, this Court in *Gwaltney* decided only statutory issues, not the constitutional jurisdiction issue presented in this case and in *Steel Co.* Further, the procedural and factual history of *Gwaltney* before this Court in 1987 were such that this Court had no basis upon which to dismiss the case as moot. Thus, the Petitioners' reliance on *Gwaltney* is misplaced.

Petitioners argue that *Gwaltney* controls by citing to the doctrine, verified in *Steel Co.*, that constitutional jurisdiction should be dealt with by a court first, before addressing the

11. Nonetheless, the burden to establish mootness is not insurmountable. "[S]peculative contingencies afford no basis for ... passing on the substantive issues [the petitioner] would have us decide ... in the absence of evidence that this is a prospect of immediacy and reality." *DeFunis v. Odegaard*, 416 U.S. 312, 320 n.5 (1985) (quoting *Hall v. Beals*, 396 U.S. 45, 49 (1969)) (internal quotes omitted).

merits of a case. (Pet'r Br. at 15.) It follows, according to Petitioners, that this Court in *Gwaltney* "necessarily decided that this case was not moot even though injunctive relief was no longer viable." (Pet'r Br. at 16.) This argument fails on several levels.

First, this Court expressly noted in *Steel Co.* that *Gwaltney* did not decide the issue of constitutional standing:

> The short of the matter is that the jurisdictional character of the elements of the cause of action in *Gwaltney* made no substantive difference (nor even any procedural difference that the Court seemed aware of), had been assumed by the parties, and was assumed without discussion by the Court. We have often said that *drive-by jurisdictional rulings of this sort (if Gwaltney can even be called a ruling on the point rather than a dictum) have no precedential effect.*

118 S. Ct. at 1011 (emphasis added).[12] Justice Stevens' concurring opinion in *Steel Co.* likewise confirms that *Gwaltney* "resolved the statutory question without pausing to consider whether the plaintiffs had standing to sue for wholly-past violations." *Id.* at 1025. Justice Stevens also stated, "the fact that we did not discuss standing in *Gwaltney* does not establish that the plaintiffs had standing there." *Id.* And, Justice Stevens pointed out "the omission of even a passing reference to any standing issue in connection with the principal holding [in *Gwaltney*]." *Id.* at 1025 n.13. As summarized succinctly by Justice Scalia, the Article III requirement of remedial injury in fact, which was addressed in *Steel Co.*, has "nothing to do with the text of the statute [Clean Water Act] relied upon" that was addressed in *Gwaltney*. *Id.* at 1014 n.2.

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12. This Court in *Steel Co.* was clearly aware of the distinction between satisfying *Gwaltney*'s statutory requirements and Article III constitutional requirements by noting that there was a "fundamental distinction between arguing no cause of action and arguing no Article III redressability . . . ." 118 S. Ct. at 1013. This Court further noted that the issue of "statutory standing . . . has nothing to do with whether there is case or controversy under Article III." *Id.*

Second, given that *Gwaltney*'s treatment of constitutional jurisdiction was, at best, a "drive-by" ruling entitled to no more weight than dicta, basic principles of jurisprudence compel that *Gwaltney* is not precedent for the constitutional issue to be decided here. It is firmly established that reasoning or language found to be dicta is not binding on courts obligated to follow that court's precedent. *See Cohens v. Virginia,* 19 U.S. (6 Wheat.) 264, 399-400, 5 L. Ed. 257 (1821); *Brecht v. Abrahamson,* 507 U.S. 619, 631 (1993) (citing *Edelman v. Jordan,* 415 U.S. 651, 670-71 (1974)).

Petitioners also argue that since mootness was raised in the 1987 *Gwaltney* briefs filed with this Court, *Gwaltney* is controlling by implication. (Pet'r Br. at 14.) However, Petitioners apparently concede, as they must, that *Gwaltney* never ruled on this precise issue, since they state that this issue was "necessarily determined" by the remand to the Fourth Circuit. (Pet'r Br. at 16.) This attempt to establish silent, but implicit, precedent has been flatly rejected by this Court. "Questions which merely murk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall,* 266 U.S. 507, 511 (1925). *Accord Hagans v. Lavine,* 415 U.S. 528, 533 n.5 (1974) ("when questions of jurisdiction have been passed on in prior decisions *sub silentio,* this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issues before us"); *Pennhurst State School & Hosp. v. Halderman,* 465 U.S. 89, 119 (1984); *United States v. L.A. Tucker Truck Lines, Inc.,* 344 U.S. 33, 38 (1952). Accordingly, unstated assumptions or rulings, which were either ignored or not raised before a court, do not become precedential holdings for future cases. *Illinois State Bd. of Elections v. Socialist Workers Party,* 440 U.S. 173, 182-83 (1979).

Lastly, Petitioners' argument that *Gwaltney* controls is based on the faulty premise that this case is factually and procedurally identical to *Gwaltney*. An examination of the history of *Gwaltney*, particularly from the District Court and Fourth

Circuit decisions that preceded this Court's 1987 opinion, reveals instead that this case and *Gwaltney* are distinguishable for a number of reasons.

The plaintiffs in *Gwaltney* originally filed their District Court complaint in June 1984, only one month after the last reported violation. *Gwaltney*, 611 F. Supp. 1542, 1544-45 (E.D. Va. 1985). In August 1984, those plaintiffs received a summary judgment ruling which declared, under a standard that this Court later overturned, the defendant "to have violated and to be in violation of" the Clean Water Act. *Gwaltney*, 484 U.S. at 54. Only a few months later, in December 1984, the District Court held a hearing as to the amount of civil penalties to be assessed. *Gwaltney*, 611 F. Supp. at 1549 n.8.

As part of its ruling, the District Court cited to testimony of a defense witness from the December 1984 hearing, who stated that he would not be confident that the violation would not recur until several months *after* the hearing, when the manufacturing plant would have undergone a full winter's operation. *Id.* The Fourth Circuit on the initial appeal recognized this factual finding, but gave it no weight, as it:

> assume[d] ... Gwaltney had ceased violating the limits of its NPDES permit ... [b]ecause we hold that the Clean Water Act confers on the district court jurisdiction over citizen suits seeking civil penalties for past violations.... [W]e need not decide whether plaintiffs in this case made their allegations of continuing violations in good faith.

Gwaltney, 791 F.2d 304, 308 n.9 (4th Cir. 1986).

The District Court's rationale for its denial of an injunction in *Gwaltney* is also significant. Petitioners argue, "the defendant's violations ceased a month before the complaint was filed.... *As a result*, no injunctive relief was awarded by the district court." (Pet'r Br. at 14) (emphasis added). However, the footnote cited by Petitioners, which was from the Fourth Circuit *after* this Court remanded the case in 1987, shows the District Court gave no justification for its denial of injunctive relief:

> The district court did not grant the injunction, *nor did its opinion give a rationale for not doing so.* However, in a later proceeding, Judge Merhige explained that he was reluctant to enjoin people to do what the law requires them to do.

Gwaltney, 890 F.2d 690, 692 n.2 (4th Cir. 1989) (emphasis added). In contrast, the District Court here expressly held that an injunction should not issue because the violations were not substantially likely to recur.

Further, the scenario this Court faced in *Gwaltney* was markedly different from the case at hand. The lower court decision appealed in *Gwaltney* had no reason to examine whether post-complaint events mooted the case. This was because the District Court and the Fourth Circuit in *Gwaltney* permitted citizen suits for wholly-past violations. Thus, those courts did not reach any factual findings as to mootness, such that the record below was insufficient for the *Gwaltney* Court to determine whether the case was moot.

This Court in *Gwaltney* could not have dismissed the case as moot because evidence on the issue was not developed below. Insufficient facts were developed below as to whether the case had become moot, unlike the situation here where the lower court expressly found that Petitioners did not meet the elements for injunctive relief against Laidlaw. Also, in 1987 this Court did not have before it an explanation from the court below as to why an injunction was denied. Lastly, no undisputed fact showing that the case was moot was present before this Court in *Gwaltney*, but is present here, *i.e.*, the closure of Laidlaw's plant. These factual and procedural distinctions demonstrate why *Gwaltney* is not controlling on the issues before this Court.

In remanding the case, this Court in *Gwaltney* gave directions to the Fourth Circuit on two issues. First, the Court expressly rejected the notion that citizens could sue for wholly past violations, and remanded for further proceedings on that issue. Additionally, this Court included a discussion on mootness, presumably not to be ignored but to identify an issue to address on remand. Not unexpectedly, the defendant raised

mootness after remand. The Fourth Circuit on remand would not have decided the mootness issue, 890 F.2d at 696, if this Court had decided, as Petitioners argue, that after *Gwaltney*'s statutory requirements are met, a case cannot become moot.[13]

II. NONE OF THE DECLARATORY RELIEF PETITIONERS REQUEST REDRESSES ANY ALLEGED INJURY.

Petitioners also argue that this case is "live" because they seek declaratory relief as to now-past violations. This argument has no merit under the redressability analysis of *Steel Co.* and should be dispensed in short order. Petitioners attempt to distinguish *Steel Co.* by arguing that a declaratory judgment as to *Laidlaw*'s now nearly decade-old permit exceedances is of some utility because *Laidlaw* contests them. (Pet'r Br. at 39-40.) However, Petitioners offer no explanation as to how such a declaratory judgment against Laidlaw, for post-complaint but now mooted violations, is different from the declaratory judgment denied in *Steel Co.* for pre-complaint violations. At the time of trial, the Petitioners here sought a declaratory judgment for wholly-past violations. As previously discussed in detail, the mere fact that such claims were never pled in *Steel Co.* is no reason to distinguish them from these claims, which have become moot.

Petitioners' analysis, if adopted, would lead to the absurd result that a defendant could avoid liability by stipulating to liability. If a Clean Water Act defendant does not believe it committed a violation, but also believes any alleged violation has been mooted due to the passage of time, that defendant would be encouraged to admit liability for the prior violations in order to eliminate redressability.

Just as in *Steel Co.*, a declaratory judgment that Laidlaw violated the Clean Water Act nearly ten years ago "is not only worthless to [petitioners], it is seemingly worthless to all the world." *Steel Co.*, 118 S. Ct. at 1018 (citing *Lewis v. Continental Bank Corp.*, 494 U.S. at 479). Such a declaration for past

13. The Fourth Circuit's 1989 *Gwaltney* decision was not appealed to this Court.

infractions is exactly the sort of "psychic satisfaction" which is insufficient to establish redressability. *Id.* at 1019. The only arguable redress for Petitioners relates to their "generalized interest in deterrence, which is insufficient for purposes of Article III." *Id.* Accordingly, Petitioners' claim for civil penalties cannot resuscitate what are otherwise non-redressable claims. Thus, the Fourth Circuit's decision properly dismissed this case as moot, and should be affirmed.

CONCLUSION

For all the reasons discussed herein, *amicus curiae*, Hercules Incorporated, respectfully requests that this Court affirm the Fourth Circuit's decision on the merits.

Respectfully submitted,

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July 19, 1999

APPENDIX OF *AMICUS CURIAE* HERCULES INCORPORATED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

PUBLIC INTEREST RESEARCH GROUP OF NEW JERSEY, INC., et al.,	:	Civil No. 89-2291 (JBS)
	:	Civil No. 93-2381 (JBS)
Plaintiffs,	:	
v.	:	ORDER FOR ADMINISTRATION
HERCULES, INC.,	:	TERMINATION
Defendant.	:	

This matter came before the court upon motion of defendant Hercules, Inc., to dismiss this case for lack of standing due to alleged absence of redressability, upon which this court heard oral argument on February 5, 1999; and

The court finding that the factual and procedural circumstances relating to redressability of the present case are indistinguishable from *Friends of the Earth, Inc. v. Laidlaw Services, Inc.*, 149 F.3d 303 (4th Cir. 1998), *cert. granted*, 119 S. Ct. 1111 (March 1, 1999), which held that, in a Clean Water Act suit seeking civil penalties and costs after injunctive relief has been denied, in which there is no probable likelihood of a repetition of events of non-compliance, the complaint for civil penalties and costs was properly dismissed as moot despite plaintiffs' standing at the time the suit was filed; because the Supreme Court will soon be determining whether the finding of mootness in *Laidlaw* was correct,[1] it appears that the wisest

1. Specifically, the Supreme Court granted certiorari on the following three issues:

> (1) Is citizen suit seeking civil penalties under Section 505 of Clean Water Act constitutionally moot under *Steel Co. v. Citizens for Better Environment*, 66 U.S.L.W. 4174 (U.S. 1998), due to lack of redressability, when plaintiffs had standing at time of complaint and have shown continuing injury-in-fact but have

course is to defer ruling upon this complex issue, or reaching the merits of this case, until the Supreme Court speaks in *Laidlaw*; and

This court, by letter of March 10, 1999, sought the views of the parties to obtain their assent to temporarily suspending this case through an Order for Administrative Termination while awaiting the Supreme Court's decision in *Laidlaw*; counsel for defendant responded that Hercules has no objection (*see* Letter of Joel Schneider, Esquire, dated March 15, 1999), while counsel for plaintiffs responded that this case is distinguishable from *Laidlaw* and that, in any event, *Laidlaw* is not binding in the Third Circuit[2] (see Letters of Carolyn Smith Pravlik, Esquire, dated March 12, 1999 and March 22, 1999); while this court agrees that *Laidlaw* is not Third Circuit precedent, a decision of the United States Supreme Court upon this issue will be binding, and it is more than worth waiting for; this court neither adopts nor rejects the Fourth Circuit's

not obtained injunctive relief? (2) Is citizen suit seeking civil penalties under Section 505 of Clean Water Act constitutionally moot under *Steel Co.*, due to lack of redressability, when district court has rendered declaratory judgment as to liability and issue of liability was contested? (3) Could plaintiffs not be awarded attorneys' fees or litigation costs because case was dismissed for mootness, even if litigation was responsible for bringing defendant into compliance with Clean Water Act?

67 U.S.L.W. 3537.

2. At oral argument on February 5, 1999, however, plaintiffs' counsel acknowledged that *Laidlaw*, though decided incorrectly by the Fourth Circuit in her view, presented circumstances indistinguishable from the present case:

> THE COURT: Is *Laidlaw* distinguishable from the present case: And I know you've argued it was wrongly decided, and of course–
>
> MS. PRAVLIK: In–
>
> THE COURT: But if it was correctly decided, is there any way to distinguish it?
>
> MS. PRAVLIK: No. I mean, obviously, it has, you know, different facts and whatever, but in terms of the relevant facts to this issue, no. It's indistinguishable from this situation.

Transcript of Hearing (Feb. 5, 1999), at 33:17 to 34:1.

analysis in *Laidlaw*, and a temporary stay of proceedings herein will be imposed in the interest of judicial economy;

IT IS this 31st day of March, 1999, hereby

ORDERED that consideration of defendant's motion is stayed pending determination by the Supreme Court in *Laidlaw*; and

IT IS FURTHER ORDERED that the Clerk shall ADMINISTRATIVELY TERMINATE this matter upon his docket, without prejudice to any party's right to reopen the docket for further proceedings consistent with law;[3] and

IT IS FURTHER ORDERED that this Order for Administrative Termination does not operate as a dismissal or other determination of any claim, nor does this Order have any consequence for purposes of statute of limitations or other rights of any party.

/s/ Jerome B. Simandle
JEROME B. SIMANDLE
U.S. District Judge

3. When the Supreme Court renders its decision in *Laidlaw*, this docket must be reopened for further proceedings upon defendant's motion and upon the merits of the plaintiffs' claims consistent with *Laidlaw*.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

PUBLIC INTEREST RESEARCH GROUP OF NEW JERSEY, INC., et al.,	:	Civil No. 89-2291 (JBS)
Plaintiffs,	:	
v.	:	
HERCULES, INC.,	:	HON. JEROME B. SIMANDLE
Defendant.	:	

STIPULATION AND ORDER

WHEREAS, on March 31, 1993, this Court ruled on plaintiffs' and 'efendant's cross-motions for summary judgment;

WHEREAS, the Court denied the cross-motions for summary judgment as to defendant's liability for six discharge violations which defendant claims were caused by an upset at defendant's facility resulting from the failure of a blower and a replacement blower (discharge violation nos. 50-51, 53, 56-58 in plaintiffs' September 14, 1992, letter to Judge Simandle);

WHEREAS, the Court granted defendant's motion for summary judgment that it is not liable for six discharge violations which were allegedly caused by an upset at defendant's facility resulting from electrical failures and heavy rains (discharge violation nos. 42-47 in plaintiff's September 14, 1992, letter to Judge Simandle);

WHEREAS, the Court denied plaintiffs' request for a permanent injunction;

WHEREAS, the parties desire to assure that the trial reduces the burden and costs on the parties and the Court by focusing on whether additional penalties may be imposed for

the violations already addressed by the New Jersey Department of Environmental Protection and Energy;

IT IS HEREBY AGREED AND STIPULATED BY THE PARTIES THAT:

1. Defendant consents to the entry of summary judgment on liability for discharge violation nos. 50-51, 53, 56-58 in plaintiffs' September 14, 1992, letter to Judge Simandle;

2. Plaintiff's agree to the dismissal with prejudice of discharge violation nos. 42-47 in plaintiffs' September 14, 1992, letter to Judge Simandle and not to seek to overturn that judgment in any court;

3. Summary judgment is entered for Hercules as to plaintiffs' claims for injunctive relief without prejudice to another application based upon future violations.

/s/Elisabeth J. Lyons
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The foregoing stipulation is hereby entered as an Order of the Court, this 28th day of July, 1993.

/s/Jerome B. Simandle
JEROME B. SIMANDLE
United States District Court Judge

Supreme Court, U.S.
FILED
JUL 19 1999
OFFICE OF THE CLERK

(23)

No. 98-822

IN THE
SUPREME COURT OF THE UNITED STATES

FRIENDS OF THE EARTH, et al.,

Petitioners,

V.

LAIDLAW ENVIRONMENTAL SERVICES (TOC), INC.,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

BRIEF FOR 40 CALIFORNIA CITIES AND THE BAY PLANNING COALITION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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Dated: July 14, 1999

36pp

LIST OF PARTICIPATING AMICI CURIAE CITIES

Bakersfield
Barstow
Burbank
Burlingame
Camarillo
Corcoran
Cotati
Delano
El Centro
Fresno
Gustine
La Habra
Lakewood
Live Oak
Long Beach
Los Alamitos
Los Angeles
Manteca
Merced
Milpitas
Monterey
Mountain View
Novato
Palm Desert
Redlands
Roseville
San Bruno
San Diego
Santa Clara
Santa Rosa
South San Francisco
Stanton
Sunnyvale
Sutter Creek
Turlock
Vacaville
Vernon
Waterford
Towns of Corte Madera Tiburon

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IN THE SUPREME COURT OF THE UNITED STATES

No. 98-822

FRIENDS OF THE EARTH, INC., *ET AL.*,
Petitioners
v.
LAIDLAW ENVIRONMENTAL SERVICES (TOC), INC.,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR 40 CALIFORNIA CITIES AND THE BAY PLANNING COALITION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTERESTS OF AMICI CURIAE

Amici Curiae Cities of Bakersfield, Barstow, Burbank Burlingame, Camarillo, Corcoran, Cotati, Delano, El Centro, Fresno, Gustine, La Habra, Lakewood, Live Oak, Long Beach, Los Alamitos, Los Angeles, Manteca, Merced, Milpitas, Monterey, Mountain View, Novato, Palm Desert, Redlands, Roseville, San Bruno, San Diego, Santa Clara, Santa Rosa, South San Francisco, Stanton, Sunnyvale, Sutter Creek, Turlock, Vacaville, Vernon, Waterford, and

the Towns of Corte Madera and Tiburon are each municipalities in the State of California. Some of these municipalities (including the Cities of Gustine, Los Angeles, Santa Rosa, and South San Francisco) have been sued in the past by citizen groups for civil penalties under the federal Clean Water Act ("CWA"), 33 U.S.C. § 1251 *et seq.* The remainder could potentially be the subject of such citizen suits in the future due to their operation of facilities subject to regulation under the Clean Water Act, including wastewater treatment plants and storm drain facilities.

Amicus Curiae Bay Planning Coalition is a coalition of over 150 businesses, associations, and local public agencies in the San Francisco Bay Area formed in 1983 to advocate balanced regulation and use of San Francisco Bay-Delta resources. The Coalition monitors and participates in state and federal agency policy and rulemaking on shoreline landuse and water quality issues. The Coalition is concerned about the drastic increase in Clean Water Act citizen suits filed in the San Francisco Bay Area in recent years seeking civil penalties. Some of the Coalition's members have been subjected to such citizen suits.

STATEMENT OF THE CASE

Petitioners in this case are citizen groups that have brought a citizen enforcement action against Respondent for alleged violations of a National Pollutant Discharge Elimination System ("NPDES") permit issued pursuant to section 402 of the Clean Water Act, 33 U.S.C. § 1342, at a facility operated by Respondent. Pursuant to section 505 of the Clean Water Act, 33 U.S.C. § 1365, Petitioners sought injunctive relief against future violations and civil

penalties for past violations. Because Respondent brought itself into substantial compliance with the NPDES permit by the time of trial, the District Court denied the claim for injunctive relief, but did award some civil penalties. Petitioners appealed based upon the adequacy of the award of civil penalties, but did not appeal the denial of injunctive relief. Respondent cross-appealed. The Fourth Circuit held that, because the issue of injunctive relief was no longer before the court, and because civil penalties alone would not have provided any remedy to Petitioners, the claim for civil penalties had become moot. *See, Friends of the Earth v. Laidlaw Env. Services,* 149 F.3d at 305-307 (4th Cir. 1998).

SUMMARY OF ARGUMENT

The Court should find that citizen groups lack standing to seek assessments of civil penalties under the Clean Water Act. Because such penalties are payable to the United States, they do not provide any redress to a citizen and thus do not satisfy the "redressability" requirement of Article III.

The Fourth Circuit below confused the issue of whether a claim for injunctive relief has become moot with the issue of whether a citizen had standing to seek civil penalties in the first place. However, the justiciability of the two different types of relief must be analyzed separately. Having standing to seek injunctive relief against an ongoing violation does not automatically give a citizen standing to seek civil penalties for past violations. Litigating the issue of how much civil penalties should be assessed for past violations raises numerous factual issues beyond what would be required to determine whether to issue an injunction.

This Court has already held in the *Steel Co.* decision that civil penalties do not provide citizens any redress for violations which precede the filing of the complaint. The Court should also hold that civil penalties do not provide redress to citizens even if the violations are still ongoing at the time of trial. Just as in the *Linda R.S. v. Richard D.* case, the court should find that it is too speculative that the assessment of civil penalties for past violations will dissuade the defendant from future violations (and thereby arguably provide redress to a citizen injured by the violations). The mere fact that criminal and civil sanctions deter violations of law does not mean that citizens injured by such violations can find redress in the assessment of such sanctions.

Citizens can still seek full redress by pursuing claims for injunctive relief. In awarding injunctive relief, a court can include coercive sanctions if a monetary fine is necessary to enforce compliance. Civil penalties for past violations are unnecessary. Petitioners' argument that injunctive relief, without an award of civil penalties, is not sufficient to achieve compliance with the Clean Water Act is analogous to an argument this Court already rejected in *U.S. Dep't of Energy v. Ohio*. Further, civil penalties still serve as a deterrence without citizens having standing to seek them, as both the United States and state agencies still have authority to seek such penalties (even for wholly past violations).

The Court should not adopt a "case-by-case" rule which leaves open the possibility that, in some cases, an award of civil penalties might provide a particular citizen with some

redress, based on the speculative possibility that it may deter a particular defendant from future violations. Such a relaxed interpretation of Article III would be cumbersome, waste judicial resources, and often lead to absurd results. Certainly, in most cases (including this one), a court will lose jurisdiction as soon as the defendant has come into compliance (even as a result of an injunction), in which case the threat of civil penalties for past violations would clearly provide a plaintiff with no redress. Upon compliance, so long as the litigation is pending (even in the court of appeal), the civil penalty claim will then have to be dismissed as nonjusticiable, and all litigation expenses and court resources spent litigating the civil penalty issue will be wasted. Plaintiffs will want to keep alive as long as possible any issue as to whether a defendant has complied, even where (as in this case) a plaintiff would otherwise no longer litigate this issue.

Allowing citizen plaintiffs to pursue civil penalties which bear no relation to the injury they actually have suffered has led to gross abuses of the federal judicial system. Citizen plaintiffs have used the threat of penalties (sometimes totalling in the millions or even hundereds of millions of dollars) to extort contributions and other concessions out of defendants. Such abuses would not occur if the relief plaintiffs could seek were limited to remedying whatever injuries they actually suffered. Under Article III, this Court should not tolerate the use of citizen suits by environmental plaintiffs as a means of "fund-raising" for their pet projects from reluctant defendants.

ARGUMENT

I. This Court should uphold the dismissal of the claim for civil penalties, not because it became moot, but because Petitioners never had standing to seek civil penalties in the first place.

The Fourth Circuit correctly found that Petitioners' claim for civil penalties under the Clean Water Act is not justiciable, but it reached this finding for the wrong reasons. The Fourth Circuit's ruling that Petitioners' claim for civil penalties became moot incorrectly presupposes that the claim originally was justiciable. Instead, the Fourth Circuit should have ruled that Petitioners lacked standing under Article III of the United States Constitution to seek such penalties in the first place. This is because requiring Respondent to pay civil penalties to the United States Treasury for past violations of the Clean Water Act never would have redressed any injury suffered by Petitioners.

A. Citizens lack standing to seek civil penalties payable to the United States, as such penalties do not redress any injury suffered by citizens.

A primary flaw in both the Fourth District's decision and in Petitioners' opening brief is that they leap immediately to the issue of whether the claim for civil penalties had become "moot," without first addressing the key threshhold issue of whether Petitioners ever had standing to seek such penalties in the first place.

This Court should find that a citizen never has standing to seek an assessment of civil penalties under sections

309(d) and 505(a) of the Clean Water Act, 33 U.S.C. §§ 1319(d), 1365(a). This is because an award of civil penalties would not satisfy the "redressability" requirement of Article III, Section 2 of the United States Constitution. As this Court has repeatedly held, in order for a plaintiff to have standing to bring an action in federal court, the plaintiff must, *inter alia*, seek relief that will redress an injury suffered by plaintiff. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 118 S.Ct. 1003, 1016-1017 (1998). Civil penalties are payable to the United States Treasury, not to the citizen plaintiff. *Gwaltney of Smithfield v. Chesapeake Bay Foundation*, 484 U.S. 49, 53, 108 S.Ct. 376 (1987); *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1, 14 n. 25, 1010 S.Ct. 2615 (1981). They thus do not provide any relief to citizens, and citizens lack standing under Article III to seek them. *Steel Co.*, 118 U.S. at 1018-1019.

This Court's holding on this issue in *Steel Co.* is controlling. That case dealt with a citizen suit under the Emergency Planning and Community Right-to-Know Act of 1986 ("EPCRA"), which, like the Clean Water Act, authorizes civil penalties payable to the United States Treasury. This Court held that a citizen plaintiff does not have standing to seek such civil penalties, because they provide no redress to the citizen:

> [T]he civil penalties authorized by the statute . . . might be viewed as a sort of compensation or redress to respondent if they were payable to respondent. But they are not. These penalties--the only damages authorized by EPCRA--are payable to the United

States Treasury. In requesting them, therefore, respondent seeks not remediation of its own injury . . . but vindication of the rule of law--the "undifferentiated public interest" in faithful execution of EPCRA. This does not suffice. Justice STEVENS thinks it is enough that respondent will be gratified by seeing petitioner punished for its infractions and that the punishment will deter the risk of future harm. . . . Obviously, such a principle would make the redressability requirement vanish. By the mere bringing of his suit, *every* plaintiff demonstrates his belief that a favorable judgment will make him happier. But although a suitor may derive great comfort and joy from the fact that the United States Treasury is not cheated, that a wrongdoer gets his just deserts, or that the nation's laws are faithfully enforced, that psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury. Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement.

Steel Co., 118 S.Ct. at 1018-1019 (citations omitted).

Petitioners weakly attempt to distinguish this holding by arguing that the plaintiff in *Steel Co.* did not allege an ongoing violation at the time the complaint was filed. Yet, as can be seen from the above excerpt, nothing in this Court's analysis in *Steel Co.* suggested that the issue of whether civil penalties "redress" a plaintiff's injuries depends on whether the alleged violation is ongoing at the

time the complaint is filed. Certainly, if a violation is ongoing, then a citizen plaintiff who is injured by the violations would have standing to seek injunctive relief against continued violations, as such injunctive relief would redress the injury. But merely having standing to seek injunctive relief does not give a plaintiff standing to seek civil penalties, and civil penalties do not provide a citizen plaintiff any redress against ongoing violations.

1. **A citizen group does not automatically have standing to seek civil penalties just because it has standing to seek injunctive relief; the justiciability of the two types of relief should be analyzed separately.**

Having standing to seek injunctive relief does not automatically give a citizen standing to seek civil penalties. Both the Fourth Circuit and Petitioners confuse the issue of citizen standing to seek injunctive relief with the issue of citizen standing to seek civil penalties. They fail to address the key threshhold questions of whether Petitioners had standing under *Steel Co.* to seek civil penalties in the first place, and, if so, why? In this subsection, we explain why standing to seek injunctive relief is not, by itself, sufficient to grant standing to seek civil penalties. In the subsections to follow, we will then explain why citizen plaintiffs should never be found to have standing to seek civil penalties.

We have found no case in which this Court has directly addressed the issue of whether and when having standing to seek one type of relief automatically grants a plaintiff standing to seek another type of relief as well. However, the holding in *City of Los Angeles v. Lyons*, 461 U.S. 95, 105,

103 S.Ct. 1660 (1993) suggests such automatic standing does not exist. The plaintiff in that case allegedly had been subjected to a chokehold and sued for both damages and for an injunction against the use of chokeholds in the future. This Court held that, while plaintiff had standing to seek damages for the chokehold he had suffered, plaintiff did not have standing to seek an injunction regulating the city's use of chokeholds in the future, given that it was speculative whether plaintiff would ever again be subjected to such chokeholds (and thus an injunction would provide no redress to plaintiff). 461 U.S. at 105-106. If the plaintiff in *Lyons* did not have standing to seek injunctive relief against future conduct just because he had standing to seek damages for past wrongs, then a citizen should not be found to have standing to seek civil penalties for past wrongs just because he or she has standing to seek injunctive relief against continued violations.

Most circuit courts that have addressed the issue have held that having standing to seek one type of relief never grants a plaintiff automatic standing to seek another type of relief:

> *See, e.g.*, *Coleman v. Watt*, 40 F.3d 255, 259 (8th Cir. 1994) (analyzing justiciability separately for damages and injunctive relief); . . . *Wagshal v. Foster*, 28 F.3d 1249, 1252 (D.C. Cir. 1994) (analyzing justiciability separately for damages and injunctive relief), *cert. denied*, 115 S. Ct. 1314 (1995); *Henschen v. City of Houston*, 959 F.2d 584, 587 (5th Cir. 1992) ("Justiciability must be analyzed separately on the issues of money damages and the propriety of equitable relief."); *Williams v. Ellington*, 936 F.2d 881, 889 (6th Cir. 1991) (analyzing justiciability separately for damages and injunctive relief); . . . *National Maritime Union of Am. v. Commander, Military Sealift Command*, 824 F.2d 1228, 1234 (D.C. Cir. 1987) ("[T]he relief the litigant seeks is crucial to the determination of his standing; he may possess standing as to one form of relief [damages] but not as to another [injunctive]."); . . . *Brown v. Edwards*, 721 F.2d 1442, 1446-47 (5th Cir. 1984) (considering jurisdiction separately for damages and injunctive relief).

Nava v. City of Dublin, 121 F.3d 453, 457 (9th Cir. 1997).

Nonetheless, the Ninth Circuit applies a more liberal rule, and has found that a plaintiff who has standing to seek one type of relief automatically has standing to seek another type of relief if the claims for relief are "predicated on a single legal theory requiring development of the exact same set of facts." *Smith v. City of Fontana*, 818 F.2d 1411, 1422 (9th Cir. 1987). However, even under this more liberal rule, a citizen with standing to seek injunctive relief against ongoing violations should not be found to have standing to seek civil penalties for past violations, because the two claims do not require "development of the exact same set of facts." The Clean Water Act expressly requires courts to consider many factual issues in determining a claim for civil penalties which would not be considered in a mere claim for injunctive relief:

> In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting

> from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require.

33 U.S.C. § 1319(d). While a court may consider various equitable factors in issuing an injunction, *see, Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312-313, 102 S.Ct. 1798 (1982), the statutory penalty factors quoted above clearly raise additional factual issues. Indeed, in many Clean Water Act cases, issues of liability and the need for an injunction are fairly readily determined, with most of the litigation effort devoted to the issue of the proper amount of civil penalties. Litigation over civil penalties can (and often does) drastically increase the scope and expense of Clean Water Act lawsuits.

Thus, citizen standing under Article III to seek an injunction against violations of the Clean Water Act in no way implies standing to seek civil penalties. The issue of whether a citizen has standing in the first place to seek civil penalties should not be confused with the issue of whether a claim for injunctive relief has become moot.

2. Civil penalties do not provide citizen plaintiffs with any redress against ongoing violations of the Clean Water Act.

This Court should find that civil penalties never provide redress to citizen plaintiffs for injuries resulting from violations of the Clean Water Act, even where violations are ongoing. It is too speculative to suppose that the award

of civil penalties for past violations (including post-complaint violations which precede the trial) will serve to discourage future violations by a defendant, sufficient to provide redress to injury which a plaintiff may suffer as a result of future violations.

As already noted, in *Steel Co.*, this Court held that an award of civil penalties payable to the United States provides no constitutional redress to a citizen, and thus that citizens do not have standing to seek such civil penalties. 118 S.Ct. at 1018-1019. Plaintiff's sole ground for distinguishing this holding is that, in *Steel Co.*, the alleged violations were not ongoing at the time suit was filed. Thus, the primary question is: ***Is there a likelihood that an award of civil penalties for past violations will redress an injury suffered by a citizen plaintiff as a result of ongoing violations, sufficient to give the plaintiff Article III standing to seek such penalties?*** Only if the answer to this question is affirmative does the Court reach the secondary question of mootness: ***Once an ongoing violation has been remedied, will the additional award of civil penalties still provide any further redress, or will civil penalty proceedings have to be dismissed at that time (even after trial but pending appeal)?*** An ongoing violation could later be rendered moot by a variety of events, including (1) compliance with injunctive relief being issued by the court, (2) voluntarily compliance by the defendant, or (3) the amendment or adoption of an NPDES permit to authorize previously prohibited discharges.

This Court has never upheld the assessment of civil penalties under the Clean Water Act or other law against a defendant in a case brought by citizens. Thus, this Court

has never had the occassion to determine whether such an award in a citizen suit is consistent with Article III. However, this Court's prior cases on standing strongly suggest that the speculative possibility that an award of civil penalties against a particular defendant will discourage future violations by that defendant is not sufficient to confer standing on a citizen plaintiff.

The case *Linda R.S. v. Richard D.*, 410 U.S. 614, 93 S.Ct. 1146 (1973) is controlling. In that case, the plaintiff sought an order compelling a state to criminally prosecute the father of her child for violating a state law requiring payment of child support. This Court held that she did not have standing, finding that it was "speculative" whether the criminal prosecution of her child's father would, in fact, result in child support payments:

> Here, appellant has made no showing that her failure to secure support payments results from the nonenforcement, as to her child's father, of Art. 602. Although the Texas statute appears to create a continuing duty, it does not follow the civil contempt model whereby the defendant "keeps the keys to the jail in his own pocket" and may be released whenever he complies with his legal obligations. On the contrary, the statute creates a completed offense with a fixed penalty as soon as a parent fails to support his child. Thus, if appellant were granted the requested relief, it would result only in the jailing of the child's father. ***The prospect that prosecution will, at least in the future, result in payment of support can, at best, be termed only speculative.***

410 U.S. 618 (emphasis added). Just like it is speculative whether the criminal prosecution of the father in *Linda R.S. v. Richard D.* would result in the payment of child support by the father, it is also speculative whether the assessment of civil penalties for past violations of the Clean Water Act will result in future compliance by the defendant. This is true even if the Clean Water Act violations are ongoing, just like the father's alleged nonpayment of child support was ongoing in *Linda R.S. v. Richard D.*

Petitioners cite prior statements of this Court for the truism that civil penalties have a deterrent effect against future violations. *Tull v. United States*, 481 U.S. 412, 422-423 (1987); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 314 (1982). Of course, it is just as true that the threat of criminal prosecution in *Linda R.S. v. Richard D.* had a deterrent effect against violation of the statute requiring child support payments, and that all criminal and civil penalties have a deterrent effect against the unlawful activity they seek to penalize. Nonetheless, "in American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." *Linda R.S. v. Richard D.*, 410 U.S. at 619. The fact that criminal and civil penalties, as a general matter, deter violations of law does not mean that the prosecution of a defendant in a particular case for past violations of law will provide redress to an individual citizen cognizable under Article III, even in cases where violations of law may be repeated.

Unlike the plaintiff in *Linda R.S. v. Richard D.*, a citizen plaintiff ***can*** seek injunctive relief under the Clean Water

Act to require compliance, providing direct redress for any injury. 33 U.S.C. § 1365(a). Thus, the case against the justiciability of a claim for civil penalties under the Clean Water Act is even stronger than the case against the justiciability of the criminal prosecution sought in *Linda R.S. v. Richard D.* Not only is it speculative whether such penalties will result in future compliance, but the award of penalties for past violations often would be redundant, given that a plaintiff usually can already get full redress via a claim for injunctive relief.

Petitioners and some of their supporting *amici* express concern that an injunction alone may be insufficient, and that without the threat of monetary sanctions. defendants will not have a sufficient incentive to comply with the Clean Water Act. There are two flaws with this argument. First, Petitioners overlook the fact that, in awarding injunctive relief, courts have full authority to include coercive fines for any future violations, even though they do not have jurisdiction to award civil penalties in an action brought solely by private citizens. *See, U.S. Dep't of Energy v. Ohio*, 503 U.S. 607, 613-614, 625, 112 S.Ct. 1627 (1992) (finding that, while the United States was immune from suit for civil penalties for past violations of the Clean Water Act, it could still be subject to coercive fines to ensure compliance with an injunction). Indeed, in *U.S. Dep't of Energy v. Ohio*, this Court rejected arguments very similar to those made by Petitioners and their supporting *amici* here:

> Ohio asserts that "federal facility compliance . . . cannot be . . . accomplished without the [punitive]

> penalty deterrent." [¶] The case for such pessimism is not, however, self-evident. To be sure, an agency of the Government may break the law where it might have complied voluntarily if it had faced the prospect of punitive fines for past violations. But to say that its "compliance cannot be . . . accomplished" without such fines is to assume that without sanctions for past conduct a federal polluter can never be brought into future compliance, that an agency of the National Government would defy an injunction backed by coercive fines and even a threat of personal commitment. **The position seems also to ignore the fact that once such fines start running they can be every dollar as onerous as their punitive counterparts**; it could be a very expensive mistake to plan on ignoring the law indefinitely on the assumption that contumacy would be cheap.

503 U.S. at 625.

Second, even though citizens do not have standing to seek civil penalties, the threat of civil penalties still serves as a deterrent effect, because the United States and state agencies can still seek civil and criminal penalties, even for wholly past violations. *Gwaltney of Smithfield v. Chesapeake Bay Foundation*, 484 U.S. at 58-59. Thus, the reasoning quoted above of this Court in *U.S. Dep't of Energy v. Ohio* (in which the Court found that the United States was completely immune from any assessment of civil penalties for past misconduct) applies with even more force here (where the threat of civil penalties for past violations, in

addition to coercive fines, still exists). Indeed, if a citizen suit brings to light egregious violations of the Clean Water Act, that by itself may lead to a separate civil penalty action by the United States or a state for those past violations. Alternatively, the United States may seek to intervene into a pending citizen suit pursuant to section 505(c)(2), 33 U.S.C. § 1365(c)(2), in which case the court could issue civil penalties in that action pursuant to section 505(a), 33 U.S.C. § 1365(a).[1]

Of course, in balancing equities, courts have the discretion to deny injunctive relief even where there is an ongoing violation of the Clean Water Act. *Weinberger v. Romero-Barcelo*, 456 U.S. at 319-320. Thus, in some cases, a citizen plaintiff will be able to establish the existence of an injury which will not necessarily be remedied as a result of pursuing injunctive relief. As this Court recognized in *Weinberger v. Romero-Barcelo*, "an injunction is not the only means of ensuring compliance," and the asssessment of

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[1]Certain states have filed an amicus brief in which they have expressed concern that, if citizens do not have standing to seek civil penalties payable to the United States Treasury, then neither will states, raising the spectre that states will not be able to penalize violators of the Clean Water Act. This concern is, of course, ludicrous. In order to have a certified NPDES permit program under the Clean Water Act, states are required to enact their own laws providing for the assessment of civil and criminal penalties. 33 U.S.C. § 1342(b)(2)(B)(7); *see, United States Dep't of Energy v. Ohio*, 503 U.S. at 612, n. 1, (in which a state brought enforcement action under Clean Water Act seeking fines imposed under state law).

fines and civil penalties is an alternative means of encouraging compliance. *Id.* at 314. However, that does not change the fact that an assessment of civil penalties does not provide a citizen plaintiff with any redress cognizable under Article III. Petitioners purport to cite the above-quoted language *Weinberger v. Romero-Barcelo* as authority for the proposition that this Court has already upheld the right of citizen plaintiffs to seek civil penalties. However, that case did not uphold (or even address) any claim for civil penalties. Further, that case dealt with a citizen suit against the United States. Thus, any reading of that case as affirming the right of citizens to sue for civil penalties against the defendant in that case (the United States) would directly contradict this Court's holding in *U.S. Dep't of Energy v. Ohio*, 503 U.S. at 615-627, that the United States is immune from suit for civil penalties.

While not directly addressing the issue of whether an award of civil penalties satisfies the "redressability" requirement of Article III, this Court's decision in *Gwaltney* ***does*** effectively state that citizens do not have standing to maintain an action solely for civil penalties, even where there ***is*** an ongoing violation of the Clean Water Act at the time the complaint is filed:

> Petitioner also worries that our construction of § 505 would permit citizen-plaintiffs, ***if their allegations of ongoing noncompliance become false at some later point in the litigation*** because the defendant begins to comply with the Act, to continue nonetheless to press their suit to conclusion. According to petitioner, such a result would contravene both the

> prospective purpose of the citizen suit provisions and the "case or controversy" requirement of Article III. Longstanding principles of mootness, however, prevent the maintenance of suit when "'there is no reasonable expectation that the wrong will be repeated.'" . . . ***Mootness doctrine thus protects defendants from the maintenance of suit under the Clean Water Act based solely on violations wholly unconnected to any present or future wrongdoing*** . . . .

484 U.S. at 66-67 (emphasis added, citations omitted). After reaching the above conclusion, this Court remanded the case to the lower court for consideration of whether any violations were ongoing. *Id.* at 67. It would be inconsistent with the above reasoning to allow a citizen-plaintiff to proceed with an action for civil penalties for violations after the they are remedied (even if the violations continued after filing of the complaint), as the above language clearly states that a Clean Water Act case should no longer be prosecuted once a defendant comes into full compliance.[2]

---

[2]Petitioners make a strained interpretation of *Gwaltney* (relying on facts not disclosed in the opinion nor before this Court, but disclosed in a subsequent appellate court proceeding) to suggest that this Court recognized the ability of citizens to pursue an action solely for civil penalties. Obviously, such an interpretation directly contradicts the language quoted above. Further, while this Court in *Gwaltney* presupposed (without deciding) the ability of citizen plaintiffs to seek civil penalties in connection with a claim for injunctive relief, 484 U.S. at 58-59, it did not analyze or decide the issue of whether Article III grants citizen plaintiffs standing to seek civil penalties in connection with a claim for injunctive relief against ongoing violations.

For all of the above reasons, the Court should find that citizens never have standing to seek an assessment of civil penalties under the Clean Water Act.

3. The Court should adopt an absolute rule that civil penalties payable to the United States never provide redress to a citizen's injury, rather than allow a "case-by-case" inquiry as to whether civil penalties would redress an injury in a particular case.

As an alternative to ruling that civil penalties will ***never*** redress a citizen's injury, the Court might be tempted to adopt a "case-by-case" rule. The Court might require an evidentiary hearing in each citizen suit as to whether the possibility of an award of civil penalties for past violations would serve as a sufficient, non-speculative discouragement against future violations by that particular defendant, under the circumstances of that particular case, so as to justify allowing the citizen to seek civil penalties in addition to, or as an alternative to, injunctive relief. However, such a relaxed interpretation of Article III would be cumbersome, result in a waste of judicial resources, and would often lead to absurd results.

First, we stress that even if the Court does not rule out the possibility that a citizen group would have standing under some circumstances to seek civil penalties, such circumstances would be extremely rare and certainly do not exist in the case now before this Court. In the proceedings

below, the District Court denied injunctive relief on the ground that Respondent had been in substantial compliance with its NPDES permit for several years by the time of trial. Even if the threat of civil penalties had, in part, spurred Respondent to come into compliance (and we understand that Respondent strongly denies this), that would not change the fact that, by the time of trial, the civil penalty award for past violations provided no redress to Petitioners and thus became non-justiciable.

Likewise, in many cases, an award of injunctive relief by the Court will provide full redress to Petitioners. As soon as such an award is made, any civil penalty award for past violations (including post-complaint violations prior to trial) will not provide any additional redress. If the award of injunctive relief is made first, then the Court will have lost jurisdiction at that point to assess civil penalties. If the Court has already assessed civil penalties by the time it issues injunctive relief providing full redress, then there will be no Article III jurisdiction for any appellate proceedings concerning the amount of civil penalties, and the civil penalty award will have to be reversed at that point. All the litigation expenses and judicial resources already consumed litigating the civil penalty issue will have been wasted.

The facts of this case illustrate the absurdity of such a "case-by-case" rule. The availability of civil penalties will always depend on whether plaintiffs are still facing threatened injury requiring redress. If, as here, the court denies injunctive relief on the ground that the violation has already been remedied, or if the court awards complete

injunctive relief, the citizen plaintiffs will virtually always (if not always) have received all redress to which they are entitled, without the need for civil penalties. A "case-by-case" rule would encourage plaintiffs to appeal any order regarding injunctive relief, in the hopes that the ongoing doubt regarding whether their injuries have been redressed will keep their claim for civil penalties alive. (Indeed, it is possible that Petitioners in this case regret not appealing the denial of injunctive relief for this reason.) Likewise, defendants will be encouraged to appeal any order for civil penalties, hoping to keep the issue alive until subsequent events make it clear that the civil penalties for past violations will not redress any ongoing or threatened injury suffered by plaintiff, at which point plaintiff will no longer have an Article III interest in pursuing the civil penalty award, which will then have to be dismissed for lack of justiciability.

Finally, even if the assessment of civil penalties for ***current or ongoing*** violations were found to provide citizens with redress, the assessment of civil penalties for ***past*** violations would not. If the Court were to adopt some sort of "case-by-case" standard, it would leave to lower courts the confusing task of drawing the line between violations which were wholly in the past at the time of trial (including post-complaint violations), and those which are sufficiently ongoing such that the assessment of civil penalties would somehow discourage future violations and provide the citizen plaintiff with a remedy.

Rather than allowing judicial resources to be wasted in litigation over the appropriate amount of civil penalties

based on the speculative possibility that, in some cases, such an award will discourage future violations by a particular defendant, this Court should adhere to the clear standard it adopted in *Linda R.S. v. Richard D.*, and hold that citizens never have standing to seek civil penalties under the Clean Water Act.

B. Allowing citizen groups to seek civil penalties has led to abuses of the Federal judicial system which this Court should not permit under Article III.

It has been the experience of at least some of the *amici curiae* herein that allowing citizen plaintiffs to seek civil penalties for past violations -- the amount of which has no relation to remedying any injury actually suffered by the plaintiffs -- has led to gross abuses of the federal judicial system which should not be tolerated by this Court. Citizens often use the threat of large civil penalties to extort payments and other concessions from public and private defendants. Indeed, environmental groups often appear to use such lawsuits as a form of "fund raising," requiring defendants to agree to fund environmental projects of importance to the plaintiffs, or face not only the expense of litigation (including plaintiffs' attorneys fees if they are successful), but also the risk of more than $25,000 per day per violation in civil penalties, the sum of which can often total into the hundreds of millions of dollars.

As an example of such citizen suit abuses, one of the *amici* herein, the City of South San Francisco, as a condition of settlement of a suit challenging NPDES violations at a wastewater treatment plant, was required to

pay $90,000 to fund a state investigation of pollution from abandoned mines in the Central Valley (another target of the citizen plaintiff) well over a hundred miles away from the City's discharges. *See, United Anglers v. City of South San Francisco*, 1997 WL 362118, *2, *5-*6 (N.D.Cal., Jun 19, 1997). In this case, there was no dispute that the City had hundreds of NPDES violations, but, before the suit was even filed, the City (working with the Regional Water Quality Control Board) already had a plan in place to install over $40 million in improvements to resolve the violations.

The City took offense at being asked to pay money to a pet project of the plaintiff which would only help it file more lawsuits against other defendants. At first, the City tried to negotiate for the funds to be spent on a local project to benefit the environment where the violations occurred. When plaintiff refused to agree, the City then asked that the money instead simply be paid to the U.S. Treasury as penalties, in strict accordance with the Clean Water Act. Even though the Act only authorizes penalties to the U.S. Treasury, and no payments to plaintiff, plaintiff refused these terms. Plaintiff countered that, if the City wanted to settle based upon payment of penalties (rather than its own pet project), the settlement demand would increase from $100,000 to $300,000. Because of a large potential exposure to civil penalties, in addition to litigation costs, the City felt it had no choice but to acquiesce. In its resolution approving the settlement agreement, the City Council bitterly recited the facts leading up to the settlement agreement and stated:

> the City further opposes the use by citizen groups of citizen suits under the Clean Water Act, and the associated threat of enormous civil penalties, to leverage contributions out of cities and other defendants to fund other causes important to the citizen groups but having no relationship to the defendants' activities.

Res. No. 50-97, City Council, City of South San Francisco (copy attached as Exhibit A).

Significantly, the settlement did not include any further injunctive relief beyond the $40 million in improvements to which the City had already committed before the suit was brought. *See, United Anglers v. City of South San Francisco*, 1997 WL 362118, at *2. Thus, the case did not result in any change in the way the City was operating the plant, but merely provided opportunity for a citizen group to come in and extract its "pound of flesh" for its own purposes.

These sorts of abuses of the federal courts are a direct result of allowing citizens to file suits for relief that has nothing to do with remedying injuries actually suffered by the citizens. If the relief a citizen is seeking bears some relationship to the injury the citizen actually suffered, then the parties could fairly negotiate a settlement designed to remedy such injuries. But where a citizen plaintiff can request millions (and even hundereds of millions) of dollars in civil penalties, bearing no relationship to the harm actually suffered by the plaintiff, the plaintiff faces a great temptation to use the threat of such penalties to leverage extra concessions. This Court should not interpret Article III to allow these types of claims to be prosecuted.

CONCLUSION

For the reasons set forth herein, this Court should find that an assessment of civil penalties under the Clean Water Act payable to the United States Treasury does not remedy any injury suffered by a citizen plaintiff, and thus that citizens never have standing under Article III to seek an assessment of such penalties, even if there is an ongoing violation for which they have standing to seek injunctive relief.

Respectfully submitted.

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Meyers, Nave, Riback, Silver
& Wilson
Counsel for Amici Curiae 40
California Cities and the Bay
Planning Coaltion

July 1999

RESOLUTION NO. 50-97

CITY COUNCIL, CITY OF SOUTH SAN FRANCISCO, STATE OF CALIFORNIA

RESOLUTION AUTHORIZING SETTLEMENT OF ACTION BROUGHT BY UNITED ANGLERS FOR ALLEGED VIOLATIONS OF THE FEDERAL CLEAN WATER ACT AT THE CITY'S WASTEWATER TREATMENT PLANT AND APPROVING AN AMENDMENT TO THE 1996-97 OPERATING BUDGET

WHEREAS, the City is a co-owner and operator of the Water Quality Control Plant ("the Plant") at 195 Belle Air Road, which is subject to National Pollutant Discharge Elimination System Permit No. CA0038130 ("the NPDES Permit"); and

WHEREAS, at times operations at the Plant have been in violation of the NPDES Permit; and

WHEREAS, the City has been in the process of planning and implementing substantial improvements to the Plant, has completed many improvements which would avoid most NPDES Permit violations during dry weather periods, and is planning to install an estimated $41 million in upgrades by the year 2000 which should avoid NPDES Permit violations during wet weather periods; and

WHEREAS, United Anglers has nonetheless brought a citizen suit against the City pursuant to the federal Clean Water Act and has alleged over 1,000 violations of the NPDES Permit; and

WHEREAS, the City disputes that there have been over 1,000 violations of the NPDES Permit, but concedes that there have been some violations of the NPDES Permit; and

WHEREAS, the federal Clean Water Act authorizes federal courts to issue orders enjoining violations of NPDES Permits and assessing civil penalties to the federal treasury of up to $25,000 per day per violation, plus attorneys fees to prevailing plaintiffs; and

WHEREAS, courts generally do not award maximum penalties against cities for treatment plant violations, but courts have awarded penalties against cities for treatment plant violations similar to those of the City in total amounts of $400,000 or greater; and

WHEREAS, during settlement negotiations with United Anglers, the City offered to pay as penalties $100,000 to an environmental water quality remediation project to take place in South San Francisco; and

WHEREAS, United Anglers insisted, as a condition to settlement, on having the money paid to the State Water Pollution Cleanup and Abatement Account, with the intent that it be used to reimburse the Regional Water Quality Control Board for the Central Valley Regions for the monitoring of privately owned inactive and/or abandoned mines in the Central Valley with drainage to watersheds leading to San Francisco Bay; and

WHEREAS, the City opposes in principle the use of its money for remediation projects to take place in the Central Valley, in areas having no nexus to any potential water quality problem which could possibly result from the City's discharges; and

EXHIBIT A

WHEREAS, the City further opposes the use by citizen groups of citizen suits under the Clean Water Act, and the associated threat of enormous civil penalties, to leverage contributions out of cities and other defendants to fund other causes important to the citizen groups but having no relationship to the defendants' activities; and

WHEREAS, the City thus proposed that the entire $100,000 in penalties be paid directly to the federal treasury as penalties, in strict accordance with the provisions of the Clean Water Act; and

WHEREAS, United Anglers, despite the City's objections, nonetheless continued to insist that the money be used for its Central Valley project as a condition of settlement (agreeing only to allow $10,000 to be paid as actual penalties to the federal treasury); and

WHEREAS, given the great exposure to penalties, which could pose a potentially great burden on the public fisc, the City feels that it has no choice but to reluctantly agree to United Anglers' demands; and

WHEREAS, United Anglers also seeks reimbursement of fees and costs in the amount of $37,956.39, which amount the court would be likely to award; and

WHEREAS, the City has negotiated a settlement of United Anglers in accordance with the above terms, which would not require the City to make any improvements to the Plant in addition to the improvements it has already been planning to make since before this litigation was filed;

WHEREAS, the City has also negotiated terms which will drastically limit the ability of United Anglers to bring another Clean Water Act citizen suit against the City for future violations of the NPDES Permit, pending the City's completion of the planned improvements;

WHEREAS, United Anglers has already approved and executed a proposed Consent Judgment in accordance with the above terms, a copy of which is attached hereto;

NOW, THEREFORE, BE IT RESOLVED by the City Council of the City of South San Francisco, that:

1. In order to settle the Clean Water Act litigation brought by United Anglers against the City in terms consistent with those set forth in the Recitals, legal counsel for the City is hereby authorized to execute the proposed Consent Judgment in a form substantially the same as the copy which is attached hereto, and any additional related documents to accomplish that purpose.

2. The City Council further authorizes an amendment to the 1996-97 Operating Budget (BA _____) Adding $137,956.39 from the Sewer Enterprise Reserve Fund for Payment of Settlement Costs. The City Manager is authorized to make all payments called for in the Consent Judgment, if and when it is approved by the Court.

* * * * * *

BEST AVAILABLE COPY

I hereby certify that the foregoing Resolution was regularly introduced and adopted by the City Council of the City of South San Francisco at a regular meeting held on the 14th day of May 1997 by the following vote:

AYES: Councilmembers James L. Datzman, Eugene R. Mullin, John R. Penna, Robert Yee and Mayor Joseph A. Fernekes

NOES: None

ABSTAIN: None

ABSENT: None

ATTEST: /s/ Barbara A. Battaya
City Clerk

A:\SETTLMNT.RES

No. 98-822

IN THE SUPREME COURT OF THE UNITED STATES

FRIENDS OF THE EARTH, et al.,

Petitioners,

V.

LAIDLAW ENVIRONMENTAL SERVICES (TOC), INC.,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

CONSENT TO FILING OF *AMICUS CURIAE* BRIEF BY AT LEAST 40 CALIFORNIA MUNICIPALITIES AND THE BAY PLANNING COALITION

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Counsel for Amici California Municipalities and the Bay Planning Coalition

Dated: July 6, 1999

EXHIBIT B

CONSENT FORM

The undersigned hereby consent to the filing of a joint *amicus curiae* brief on behalf of Respondent in this case by at least 40 California municipalities and the Bay Planning Coalition. The California municipalities include the Cities of Bakersfield, Barstow, Burlingame, Camarillo, Corcoran, Cotati, Delano, El Centro, Fresno, Gustine, La Habra, Lakewood, Live Oak, Long Beach, Los Alamitos, Los Angeles, Manteca, Merced, Milpitas, Monterey, Mountain View, Novato, Palm Desert, Redlands, Roseville, San Bruno, San Diego, Santa Clara, Santa Rosa, South San Francisco, Stanton, Sunnyvale, Sutter Creek, Turlock, Vacaville, Vernon, Waterford, and the Towns of Corte Madera and Tiburon.

Dated: 7/13/99

OGLETREE, DEAKINS, NASH SMOAK & STEWART, P.C.

By: DACockrill

Donald A. Cockrill
Counsel for Respondent

Dated: 7/8/99

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(24)

Supreme Court, U.S.
FILED
JUL 19 1999
OFFICE OF THE CLERK

No. 98-822

In the Supreme Court of the United States

October Term, 1998

FRIENDS OF THE EARTH INC., ET AL.

Petitioners

v.

LAIDLAW ENVIRONMENTAL SERVICES (TOC), INC.

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR CALIFORNIA ASSOCIATION OF SANITATION AGENCIES AS AMICUS CURIAE SUPPORTING AFFIRMANCE

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53pp

QUESTION PRESENTED

Whether a citizen plaintiff under the Clean Water Act *always* lacks constitutional standing to seek an assessment of civil penalties payable to the federal Treasury, even if, at the time of suit (or the time when the penalties would be assessed), violations of the Act are continuing or likely to recur.

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No. 98-822

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FRIENDS OF THE EARTH INC., ET AL.

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LAIDLAW ENVIRONMENTAL SERVICES (TOC), INC.

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR CALIFORNIA ASSOCIATION OF SANITATION AGENCIES AS AMICUS CURIAE SUPPORTING AFFIRMANCE

Having obtained the consent of all parties, whose letters have been filed with the Clerk, the California Association of Sanitation Agencies respectfully submits this Brief as Amicus Curiae supporting affirmance of the judgment below.[1]

[1]No counsel for a party authored any part of this brief and no one other than Amicus Curiae made any monetary contribution to the preparation or submission of the brief.

INTEREST OF THE AMICUS

1. The California Association of Sanitation Agencies ("CASA") is a California non-profit corporation that represents California public wastewater collection and treatment agencies. Founded in 1957, CASA has approximately 100 members. They include some of the State's smallest municipal sanitation agencies, and some of the largest, such as the East Bay Municipal Utility District and the County Sanitation Districts of Los Angeles County. CASA serves as a forum for information sharing, and as a legislative and regulatory advocate for the common interests of its members.

Every member of CASA operates under, or depends upon, a permit issued pursuant to Section 402(b) of the Clean Water Act, 33 U.S.C. § 1342(b). That section implements the National Pollutant Discharge Elimination System ("NPDES") program established under Section 402 of the Act, 33 U.S.C. § 1342. Since California has a federally approved water-quality program, these permits are issued by the State's Regional Water Quality Control Boards. *See* 33 U.S.C. § 1342(b); Cal. Water Code § 13160. (In those States without such a federally approved program, the Section 402 permits are issued directly by the Environmental Protection Agency.) CASA members are thus subject to the substantial array of enforcement tools available to the state permit-issuing agencies, and to the EPA as well, which can initiate enforcement action or take over a state-initiated enforcement action, as it sees fit. *See* 33 U.S.C. § 1319.

In addition to governmental enforcement of the terms of an NPDES permit, another potent enforcement threat faces these agencies. That threat is of a suit in federal court brought by an individual, or a group, seeking injunctive relief and, of course, attorneys' fees, under the citizen-suit provision of the Clean Water Act. 33 U.S.C. § 1365. If Petitioners prevail here, such private plaintiffs may additionally seek to have the court impose civil penalties payable to the federal Treasury. The

popularity of citizen suits is on the rise. Members of CASA—indeed all NPDES permit holders around the country—are facing more frequent threats of citizen suits, and more actual such suits. (The threat of suit is most often resolved by the permit holder simply paying money to the Plaintiff as attorneys' fees in exchange for a release, thus saving itself the litigation costs.)

2. One such member agency of CASA is the Vallejo Sanitation and Flood Control District (the "District"), a local governmental body that provides sanitary sewer and flood control services for the City of Vallejo in northern California. Among other things, it operates a publicly owned treatment works that collects and treats wastewater and ultimately discharges the effluent into arms of San Francisco Bay. For those discharges, the District obtained from the California Regional Water Quality Control Board (acting as surrogate for the federal EPA) an NPDES permit under the Act. That permit, the District has asserted, set knowingly unrealistic effluent limitations which the District has been unable to meet in all respects. Although the District was therefore found in technical violation, the Board, recognizing that, at least for the moment, full compliance with the permit was not feasible, had instituted no enforcement proceedings and, indeed, had declared itself satisfied with the status quo and the District's continuing program of improvements. Nor had the responsible federal agency, the EPA, initiated proceedings. But, notwithstanding, an environmental group called San Francisco BayKeeper, invoking the citizen suit provisions of the Clean Water Act, filed its own suit against the District, seeking both injunctive relief and the assessment of civil penalties.

The United States District Court for the Eastern District of California granted summary judgment to the Plaintiff on the question of liability, postponing to a later penalty phase most of the District's defenses. *San Francisco BayKeeper v. Vallejo Sanitation and Flood Control District*, CIV-S-96-1554 DFL (E.D. Cal. May, 28, 1998) (unpublished memorandum of

opinion and order on summary judgment motion) (Appendix 1A hereto). More recently, the court separately considered the question presented here: whether a citizen plaintiff has constitutional standing to seek an assessment of civil penalties payable to the federal Treasury when continuing or recurring violations of the Clean Water Act are alleged. In a Memorandum Opinion dated March 1, 1999 (Appendix 1B hereto), the court answered the question in the affirmative, expressly disagreeing with the ruling of the District Court for the Northern District of California in the *Cargill* litigation. *San Francisco BayKeeper v. Cargill Salt Division*, No. C96-02161 CAL (N.D. Cal. Nov. 19, 1998) (unpublished order on pretrial and in limine motions) ("*Baykeeper Order*") (Appendix 1C hereto).

3. The instance just summarized is far from isolated. It is, indeed, typical of a large category of cases, occurring nationwide. As one would expect, citizen suits under the Clean Water Act and similar laws usually target alleged violations that are marginal (if they are violations at all) and that the federal and state enforcement agencies are content to monitor without initiating formal proceedings. The setting may be, as in *Vallejo*, a series of technical violations that apparently do no measurable harm to the environment and are, for the immediate future, impossible to cure. Or the case may be one in which the theory of coverage is, at best, strained and no concrete environmental damage is even suggested. Or the scenario may be a variant of these examples.

One obvious risk of the intervention of a citizen plaintiff in such cases—an intervention not subject to screening by the statutory agencies unless they choose to "take over" a lawsuit (which, in this example, they had already determined not to *initiate*)—is that needless lawsuits result, with all the attendant costs to the federal judiciary, to the defendants, and to the opportunity for negotiated solutions. Within constitutional limits, of course, one must defer to the Congressional decision to allow such suits. But it <u>does</u> make a significant practical

difference whether civil penalties can be assessed in private lawsuits. The volume of such litigation—especially the most doubtful cases—surely will diminish if a negative answer is given.

As Petitioners themselves insist, the prospect of substantial civil penalties in non-Government litigation severely inhibits a landowner or operator. More so than exposure to injunctive relief, because an injunction normally speaks only to the future and, if obeyed, imposes no significant additional financial liability on the defendant. By contrast, the threat of civil penalties is that, unless he or she retreats to unarguable conformity at the right early moment, the same landowner or operator risks a penal assessment for the past acts that may be found to violate the law, even if only as a technical matter.

No one properly can complain so far as the upshot is merely to deter serious violations. But the effect is not so limited. The many who cannot afford both the costs of litigation <u>and</u> potentially heavy financial penalties will be pushed to shelter behind a safe line that, out of abundance of caution, excludes a perfectly legal zone. This is <u>not</u> all to the good. It discourages projects ultimately beneficial to the environment and it wrongly burdens, not only private enterprise, but also governmental operators (like the Vallejo Sanitation and Flood Control District) that perform essential services in the broader public interest.

More than enough has been said to make plain that the Amicus has a real and substantial interest in this litigation.

ARGUMENT

REGARDLESS OF ANY CONTINUING VIOLATION BY THE DEFENDANT OR ANY PROSPECT OF HIS RE-OFFENDING, A CITIZEN PLAINTIFF UNDER THE CLEAN WATER ACT ALWAYS LACKS CONSTITUTIONAL STANDING TO SEEK CIVIL PENALTIES

A. Introduction and Summary

1. The present brief is addressed to a single issue (which is answered in the negative): Whether a citizen plaintiff under the Clean Water Act ever has constitutional standing to seek an assessment of civil penalties that will be paid to the federal Treasury.[2] Although this is, admittedly, a broader question than the first question stated by Petitioners, we submit it is "fairly subsumed" within the Questions Presented. It is, moreover, the very issue on which the decision below ultimately rests. And standing is, in any event, a fundamental jurisdictional prerequisite which the Court has an independent duty to satisfy itself about, regardless whether the parties have raised it, or even conceded jurisdiction. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 118 S. Ct. 1003, 1012-13 (1998); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 73 (1997).

The Court of Appeals reasoned that "[b]ecause Plaintiffs have not appealed the denial of declaratory and injunctive relief, the only potential relief that may be available to redress their claimed injuries is the civil penalty imposed upon Laidlaw, which would be paid to the United States Treasury."

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[2]We do not here address Questions 2 and 3 presented by the Petition relating to the sufficiency of a declaratory judgment to defeat mootness and to plaintiffs' entitlement to attorneys' fees notwithstanding dismissal of the case as moot. Nor do we express any view as to Respondent's Suggestion of Mootness.

149 F.3d 303, 306 (4th Cir. 1998). Invoking this Court's decision in *Steel Co.*, the appellate court went on to assert that "[s]uch penalties, however, cannot redress any injury suffered by a citizen plaintiff." *Ibid.* Hence, held the Court of Appeals, the case was now moot.[3]

We recognize that the parties, and the United States as *Amicus Curiae*, have adopted a different approach to the case. Their several submissions discuss the difference between initial standing and subsequent mootness, and assume the continuing vitality of *Gwaltney v. Chesapeake Bay Foundation*, 484 U.S. 49 (1987), insofar as that decision accepted that a citizen suitor under the Clean Water Act had both constitutional standing and statutory authority to seek civil penalties against a continuing violator or one likely to re-offend. But, obviously enough, all that debate is swept away if, as we contend, the *Gwaltney* assumption is in error and Article III of the Constitution (construed in light of the principle of Separation of Powers) denies a federal court judicial power to

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[3]Whether or not the case was, strictly speaking, "moot," it is important to stress that the ruling which concerns us here is not based on mootness, but is, rather, a decision "on the merits" that, as a matter of law, no citizen plaintiff ever has standing to initiate or maintain a suit for penalties payable to the Treasury. Plaintiffs always lacked standing to sue for penalties and, accordingly, the assessment of penalties by the District Court had to be vacated as beyond judicial power, quite independently of any "live" issue as to the propriety of an injunction or other relief.

We do not read the Court of Appeals' *arguendo* assumption that Plaintiffs "had standing to initiate this action" as intimating anything to the contrary. *See* 149 F.3d at 306 n.3. Presumably, such standing was deemed to be supported by their prayer for injunctive relief to abate a continuing or recurring violation (*see Steel Co.*, 118 S. Ct. at 1019), not on the assumption that Plaintiffs once had standing to seek penalties, but no longer do. This appears to be confirmed by the Fourth Circuit's effective overruling of a prior decision which had recognized a citizen plaintiff's standing to seek penalties in a case of continuing or potentially recurring violations. 149 F.3d at 306-7 n.4.

entertain a private claim for penalties payable solely to the Treasury, even when the defendant is a current or likely recurring violator. Staking our argument on this fundamental ground, we are excused from defining a "continuing" or "recurring" violation, as opposed to a "wholly past" violation, and have no occasion to apply the special rules of the mootness doctrine as to the standard of proof required to establish no prospect of recurrence. As we have said, the sole submission of the present brief is that Plaintiffs never had standing to advance the penalty claim and, on that basis alone, the penalty award must be vacated. *See* n.3, *supra*.

2. We begin by noticing how this Court's decision in *Steel Co.* has affected the issue: At the least, it has placed a question mark over the Court's assumption in *Gwaltney* that, in the case of a continuing or recurring violation, a citizen plaintiff under the Clean Water Act has standing to seek civil penalties. We then note that, with respect to Article III standing, *Gwaltney* itself appears simply to have accepted the premise put forward by the parties and by the United States, without independent analysis. No other decision of this Court having reached the question, we conclude that it is open for plenary consideration at this time.

Next, we deal with the contention that the deterrent effect of exposing a violator to civil penalties at the suit of a citizen plaintiff establishes standing. Initially, we point out that, however much fear of penalties may have contributed to goading a violator to earlier compliance, the actual assessment of penalties made after the risk of further violations has ended serves no present or future deterrent purpose and, accordingly, cannot be said to redress the plaintiff's injury in any way. In any event, we go on to demonstrate by a series of examples, that even specific deterrence of future unlawful conduct is not always sufficient to confer standing on an injured citizen. However obvious the effect, the relief sought must have a close nexus to the injury complained of and must be one that the plaintiff appropriately can invoke.

Finally, we examine more closely whether the assessment of civil penalties payable to the Treasury is a weapon a private citizen properly can wield. We conclude that it is not, both because to lend such a weapon to a private plaintiff impermissibly trenches on the constitutional prerogatives of the Executive and because, in any event, the remedy is insufficiently related to the underlying injury.

B. The Issue Is Open For Consideration By The Court

1. It may be, as the Court below held, that *Steel Co.* resolves the question addressed here in Respondent's favor. *See Baykeeper Decision supra* (reading *Steel Co.* as announcing a "flat rule" disallowing, in all circumstances, the assessment of civil penalties payable to the Treasury in a citizen suit under the Clean Water Act). Or it may be that *Steel Co.* has effectively adopted the less categorical rule articulated in *Dubois v. Department of Agriculture*, 20 F.Supp.2d 263 (D.N.H. 1998). There, *Steel Co.* was construed as holding that the only deterrent relief relevant to the "redressability" element of standing is that which, at the time the relief is granted, predictably will deter future violations. Thus, if (as there) the court has already issued an injunction that insures against further violations, any request for civil penalties becomes moot. And, by a parity of reasoning, no penalties can be assessed when, at the time of the actual assessment, even without an injunction, all violations have ceased and there is no basis for anticipating their resumption. It might be argued that the present case fits that description, but there is reason to doubt it.[4]

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[4]We accept (as Petitioners and the United States argue at some length) that the denial of an injunction does not necessarily reflect a view that the violation reasonably cannot be expected to recur. An injunction often is denied simply because there is no real prospect of recurrence. In this case, however, the District Court apparently believed there was some risk that Laidlaw would re-offend, commenting that the assessment of penalties and attorneys' fees would provide "adequate

While we endorse both of these results, we do not rest on the assertion that either of them has been definitively settled by this Court in *Steel Co.* On the other hand, one can say without undue boldness that, at present, the constitutional standing assumption of *Gwaltney*, if still alive, is not altogether well. At the least, *Steel Co.* has placed a question mark over that aspect of the *Gwaltney* ruling.

The contrast between the *Steel Co.* Court's discussion of citizen standing in respect of injunctive relief and in respect of civil penalties is too stark to ignore. In the former context (discussed last), it is expressly conceded that a citizen plaintiff has standing to seek an injunction to abate a continuing violation or a threatened recurrence. *Steel Co.*, 118 S. Ct. at 1003. But, when civil penalties are considered, no comparable statement is volunteered. On the contrary, the only concession is that such penalties "might be viewed as a sort of compensation or redress to [the citizen plaintiff] if they were payable to [him] . . . [which] they are not." *Id.* at 1018. The notion that penalties would likely redress the plaintiff's injury by deterring the defendant from continuing or resuming his unlawful conduct is (pointedly?) left unsaid.

So, also, the *Steel Co.* Opinion, while reciting that, in *Gwaltney*, "Article III standing was . . . found," does not endorse or approve that finding. *Id.* at 1011. Thus, it is fair to conclude that the *Steel Co.* Court deliberately left our question open—so far as it could.

2. Of course, the retort can be made that, by careful silences, the Court could not open an issue already firmly resolved by earlier precedents. But "resolved" implies a matter as to which the opposing views, with supporting arguments, were submitted to the Court and considered by it. So far as we can discern, that was not the situation in *Gwaltney* or any prior case.

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deterrence." Pet.Br. 32-33.

As it happens, this Court decided no citizen suit seeking civil penalties under the Clean Water Act or other comparable legislation before *Gwaltney*; nor (except for *Steel Co.*) has it considered any since. Stray statements in opinions dealing with entirely different claims are obviously of little import. *See Middlesex Cty. Sewerage Auth. v. Sea Clammers*, 453 U.S. 1, 14 n.25 (1981); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 314 (1982); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 226 (1985). The whole weight of "precedent," such as it is, accordingly falls on *Gwaltney*.

The fact is that neither of the immediate parties in *Gwaltney*, nor the United States as *Amicus Curiae*, raised the issue tendered here.[5] Nor did the Court discuss it. The

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[5]To be sure, in *Gwaltney* Petitioner (the Defendant) and the United States (initially in footnotes) invoked both Article III and Article II against the contention that a citizen plaintiff could seek penalties for wholly past violations. Brief for Petitioner, *Gwaltney v. Chesapeake Bay Foundation*, 484 U.S. 49 (1987) ("Pet. Br."), at 37 n.48; Brief for United States as Amicus Curiae, *Gwaltney v. Chesapeake Bay Foundation*, 484 U.S. 49 (1987) ("U.S. Br."), 21-22 n.34; Reply Brief for Petitioner, *Gwaltney v. Chesapeake Bay Foundation*, 484 U.S. 49 (1987), 15-17. Contrary to Petitioners (Pet.Br. 15), this is not "the identical redressability argument that the court of appeals adopted in the present case," but a much more limited submission. Even then, moreover, Gwaltney submitted that the Court could "avoid the necessity of reaching the constitutional issues" by accepting its statutory construction. Reply Brief for Petitioner 17. And the United States likewise stated that these "serious constitutional questions would arise" only if the Clean Water Act were construed to permit private citizens to seek penalties payable to the Treasury in respect of wholly past violations. U.S. Br. At 20-21.

Two *Amicus* briefs, among almost a dozen, did advance more comprehensive constitutional objections to the provision for civil penalties at the suit of a citizen plaintiff. Brief as Amicus Curiae of Bethlehem Steel Corporation et al. and Brief as Amicus Curiae of Rollins Environmental Services (N.J.), in *Gwaltney v. Chesapeake Bay Foundation*, 484 U.S. 49 (1987). But, despite a disclaimer in

Gwaltney Opinion, so far as it briefly dealt with Article III, was preoccupied solely with the argument advanced by the Defendant there "that failure to require proof of allegations under § 505 would permit plaintiffs whose allegations of ongoing violation are reasonable but untrue to maintain suit in federal court even though they lack constitutional standing." *Gwaltney*, 484 U.S. at 65-66. To be sure, in rejecting this argument, the Court assumed that a citizen plaintiff enjoyed Article III standing to pursue a claim for civil penalties in respect of an ongoing violation. But so much was conceded on all sides, including by the United States, and there was no occasion to wrestle with the question. Thus, if not strictly a "drive-by jurisdictional ruling" (*see Steel Co.*, 118 S. Ct. at 1011), the Article III premise of *Gwaltney* is properly characterized as an unchallenged assumption, rather than a considered decision. Such a finding is manifestly more open to reconsideration without offending the principle of *stare decisis*—attenuated, in any event, as that doctrine is in constitutional cases.

C. Specific Deterrence Does Not Suffice To Establish Standing

With this preamble, we turn to the merits of our submission that a citizen plaintiff under the Clean Water Act always lacks constitutional standing to seek civil penalties payable to the federal Treasury. The first step to that end is to expose the flaw in the proposition that deterrence, or at least specific deterrence of the defendant, is the sufficient test of standing.

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one case (Brief as Amicus Curiae Bethlehem Steel et al. at 7 n.7), both these submissions, alleging, *inter alia*, a violation of the Appointments Clause of Article II, reach much further than our argument, necessarily challenging the constitutionality of Section 505(a)(1) of the Clean Water Act as a whole, including the authorization to sue for injunctive relief. Nothing in the Court's Opinion suggests that these contentions were considered.

Petitioners argue at some length that, in practice, the fear of substantial penalties assessed at the suit of a private citizen, albeit the penalties would be paid into the federal Treasury, is a very real deterrent to violations of the Clean Water Act, and, more particularly, acts as a strong deterrent to a specific violator from continuing or resuming the unlawful conduct that has injured the plaintiff. Passages from opinions of the Court are pleaded in aid. *See Tull v. United States*, 481 U.S. 412, 423 (1987). The lesson is then drawn that the actual or threatened imposition of penalties, by causing the violator to cease his wrongful conduct, "redresses" the plaintiff's injury, at least for the future (in the same way as a prohibitory injunction does), and hence confers standing.

The premise is freely granted. Indeed, the practical objection to penalties available at the instance of a private suitor is that they tend to over-deter. *See* "Interest of the Amicus," *supra* at 4-5. But the legal conclusion does not follow.

1. At the outset, it is worth stressing that the assessment of penalties payable to the Treasury can "redress" a private plaintiff's injury only by deterring future conduct. As the Court noted in *Steel Co.* (118 S. Ct. at 1018), such penalties cannot serve as "compensation" or "remediation" for any past injury to a citizen plaintiff. Moreover, it is arguable, as *Dubois* held, that the actual imposition of civil penalties can be deemed specific deterrence only if, at that time, there remains a real prospect of violation—a prospect that does not exist when the defendant has irretrievably changed his practices or when an outstanding injunction already assures against re-offending. But, even so, there are concededly many situations—apparently including the present case—in which civil penalties have the practical effect of inhibiting future violations. The question remains whether such an effect establishes redressability.

2. The truth is that deterrent effect, while it is a necessary ingredient of any relief that is not compensatory, is not always sufficient to satisfy Article III. The fallacy is readily shown.

For instance, we suppose all would agree that subjecting potential violators to suit for civil penalties, payable to the Treasury, by anyone, regardless of special interest, would have a substantial deterrent effect. Experience tells us that, at least in the environmental field, there would be no dearth of "volunteers" ready to sue, even though they have suffered no cognizable injury and have nothing personally to gain from the litigation. Yet, such a scheme plainly would violate Article III. The reason, to be sure, is the absence of any "concrete," "personalized" injury to the plaintiff, as much as failure of "redressability." But the point remains that deterrence is not the talisman it is claimed to be.

It may be said, more conservatively, that where injury and causation are present, the third element of standing, "redressability," necessarily is satisfied once it is shown that the relief sought would tend to deter the conduct which causes the plaintiff's injury. But that is not the law, nor could it be. For the proposition proves too much. Since any relief (always coupled, as it is, with a claim for attorneys' fees) would produce some deterrent effect, the redressability requirement would have evanesced.

One need only assume (however unrealistically) a revised law providing that, win or lose in all other respects, a citizen plaintiff who establishes a violation of the Clean Water Act (and comparable laws) always recovers his attorneys' fees and costs from the defendant, even when it is shown that the violation irrevocably and independently ceased well before the litigation was conceived. Of course, such an award cannot redress any present injury. But it is entirely plausible to claim that, under such a regime, the likelihood of the defendant having violated the law in the past, and thereby injured the plaintiff, is measurably diminished. And, in any event, given the substantial sums involved, one must concede that such a rule would work as a real incentive to a violator to reform his conduct sooner rather than later. This, however, does not entitle a citizen plaintiff to pursue an otherwise moot case.

Steel Co., 118 S. Ct. at 1018-1020, and cases there cited.

Why not? As the Court has noted, the award of attorneys' fees "would assuredly benefit [the plaintiff] as opposed to the citizenry at large." *Id.* at 1018. And, as we have just said, the prospect of such an award—the amount of which usually significantly increases as time goes by—would tend to redress his injury by goading the defendant into swifter compliance. Redressability thus appears to be satisfied. But there remains a basic obstacle, inhering in the fact that the recovery of "the cost of bringing suit" is merely incidental, a "by-product," of the underlying litigation. *Id.* at 1019. To grant such an award when all other relief is foreclosed would be to allow the tail to wag the dog, and a dead dog at that. More fundamentally, the connection is too circuitous, too fortuitous and too indirect to confer standing.

The same point—that deterrence alone is not enough to confer standing even on a plaintiff who has suffered cognizable injury—is illustrated by a quite different hypothetical. Let it be assumed that Congress amends the citizen suit provision of the Clean Water Act to permit a plaintiff to seek, and a court to grant, a mandatory order requiring the responsible federal agency to prosecute, criminally or civilly, as the court finds appropriate, a particular alleged violator (in contrast to the present law, which only authorizes a suit to compel the performance of a nondiscretionary duty). Presumably, the availability of such an additional enforcement tool would introduce a further deterrent to the unlawful conduct that has injured the plaintiff. Yet, there can be no doubt that a private individual is without standing to pursue such a remedy, not only because it would involve both him and the court in an impermissible usurpation of Executive prerogatives, but on the more immediate ground that "a private citizen lacks a judicially cognizable interest in the prosecution or non-prosecution of another." *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973).

The question to which we now turn is whether a like impediment denies standing to a citizen plaintiff seeking to

maintain a suit for the purpose of directly provoking the assessment of a civil penalty payable to the Treasury. Our submission is that, here also (arguably more so), standing is barred unless one overrides Article III on the pragmatic ground that a laudable end justifies any means conducive to the desired result.

D. The Assessment Of Penalties Is Insufficiently Related To The Citizen Plaintiff's Legitimate Interest

"How's that, again?" is the likely reaction of the untutored ear when asked whether a private citizen properly may bring suit to compel a violator of federal environmental law to pay a fine to the Government. It is certainly a very odd solution to turn over to entirely private individuals or associations the collection of statutory penalties due the Treasury. Unsurprisingly, except for the hoary and quite distinguishable precedent of *qui tam* actions,[6] modern legislation contains no

[6] *Qui tam* actions have been with us since the beginning and the surviving example, in the False Claims Act, 31 U.S.C. § 3729 *et seq.*, dates from 1863. *See United States ex rel. Marcus v. Hess*, 317 U.S. 537, 540-542 and n.7 (1942). Their distinctive feature, of course, is that, unlike the citizen suit provisions of current environmental laws, they give the plaintiff a stake in the monetary recovery by allowing him to keep a substantial share of the award. *See* 31 U.S.C. § 3730(d), as amended by Pub. L. No. 99-562 § 3, 100 Stat. 3153.

Even so, it must be an open question whether the *qui tam* provisions of the False Claims Act which condone the suit of a plaintiff who has "no interest whatever in the controversy" except to recover his informer's grant (*Marvin v. Trout*, 199 U.S. 212, 225 (1905)) can survive this Court's recent standing precedents requiring a "particularized injury." *See Steel Co.*, 118 S. Ct. at 1030 (Stevens, J., concurring). The venerable pedigree of *qui tam* actions, going back to pre-Revolutionary England (*see Marvin*, 199 U.S. at 225), is, of course, no guarantee of constitutionality. After all, the point of the Constitution was not always to import the much-vaunted (and often exaggerated) "rights of Englishmen" for the benefit of now free

such scheme until the environmental laws of the last three decades. Indeed, as late as 1970 when the citizen suit provision of the Clean Air Act (42 U.S.C. § 7604) was framed, legislators apparently believed it right to confine private plaintiffs to injunctive relief. *See* Pub. L. No. 91-604, § 12(a), 84 Stat. 1676; *Gwaltney*, 484 U.S. at 62 ("citizen suit provisions authorized by the Clean Air Act . . . are wholly injunctive in nature.")

The awkward character of the innovation imported into the Clean Water Act in 1972 is betrayed by the language used. Instead of straightforwardly providing that a citizen may sue to have the courts "award" or "assess" civil penalties, Section 505(a) (33 U.S.C. § 1365(a)), empowers district courts to "enforce [an] effluent standard or limitation [imposed by the Act], or [an] order [issued by the EPA Administrator or a State with respect to such a standard or limitation] . . . and to apply any appropriate civil penalties [provided for under the government enforcement section]." This strange terminology—"apply," followed by an unexplained "appropriate"—seems to reflect Congressional unease about this new idea of making penalties payable to the federal Treasury available in private lawsuits.

What is more, the introduction of penalties in citizen suits was, at best, half-hearted. As Petitioners correctly stress (Pet.Br. 35-37),[7] and as this Court has explained more than

Americans, but, in some cases, to repudiate English institutions—most notably in establishing a government based on separation of powers. In the early years of the Republic, however, legislators, lawyers and judges, steeped in the common law, sometimes accepted English precedents without noticing that the American Constitution announced a different principle. *See, e.g., Chicago v. Morales*, No. 97-1121, 1999 U.S. LEXIS 4005 (June 10, 1999) at *20 n.20. Indeed, even a Founding Father like Hamilton, or a distinguished Chief Justice like Marshall, could get it wrong, at least initially. *See Myers v. United States*, 272 U.S. 52, 136-37, 139-42 (1926).

[7] In stressing that the Clean Air Act was the model for the citizen suit

once, *Sea Middlesex*, 453 U.S. at 17-18 n.27; *Gwaltney*, 484 U.S. at 62, the citizen suit provision of the Clean Water Act was expressly modeled on the comparable provision of the Clean Air Act, albeit the earlier law did not authorize the assessment of penalties in such private actions. While the new authority to assess penalties is duly noted in the legislative reports, no significance is attached to the innovation. *See, e.g.*, S. Rep. No. 414, 92d Cong., 1st Sess. 79 (1971); H.R. Rep. No. 911, 92d Cong., 2d Sess. 133 (1972). The Court has accordingly concluded that, in the context of a citizen suit (unlike a governmental enforcement action), civil penalties are a mere adjunct of injunctive relief: "citizens, unlike the Administrator, may seek civil penalties only in a suit brought to enjoin or otherwise abate an ongoing violation." *Gwaltney*, 484 U.S. at 59.

In sum, even the Congress of 1972 appears to have been hesitant and uncomfortable when it imported governmental penalties into private litigation, and in *Gwaltney* the Court also seems to betray some unease with the innovation, confining it severely. We submit these doubts were well founded and today should lead to a total rejection of the concept.

2. Our objection, it must be emphasized, reaches only penalties. There is nothing anomalous in a private citizen obtaining an injunction against the wrongdoer who is injuring him or has injured him and is likely to do so again. This is so when the form of the order is prospective, restraining the defendant from continuing or resuming his unlawful conduct; such a prohibitory injunction is directly aimed at preventing the plaintiff's further injury, and, thereby, will afford him at least partial redress. And it is equally so when a "mandatory" or "remedial" injunction is sought, requiring the defendant to

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provision of the Clean Water Act, Petitioners appear to have forgotten that the former did not, as of 1972, authorize the assessment of civil penalties in private lawsuits. That did not happen until 1990. *See* Pub. L. No. 101-549, § 707(a), 104 Stat. 2399.

remove, so far as possible, the cause of a past violation which continues to injure the plaintiff. But the case is quite different when penalties payable to the Treasury are assessed in a citizen suit.

What is peculiarly offensive to the principle of standing is the concession to a private citizen to maintain what is essentially a prosecution for a Governmental fine. The practice of other centuries and other jurisdictions notwithstanding, it is today settled in American federal law that such a plaintiff has no standing to seek the imposition of a criminal penalty (notwithstanding the obvious deterrent effect), given that he "lacks a judicially cognizable interest in the prosecution . . . of another." *Linda R.S.*, 410 U.S. at 419. Yet, the "civil penalties" involved here are also "punitive" in nature, *Tull*, 481 U.S. at 423, and, from the point of view of the citizen plaintiff, would seem to be equally none of his or her business. Since he or she does not share in the assessment or otherwise show any direct interest in the penalty, it is not sufficient that the citizen, quite gratuitously, gains an indirect benefit from the suit. The relation between relief and injury may be causally proven, but it is nevertheless too attenuated, depending as it does on inappropriately lending the plaintiff a Governmental weapon to which he or she has no right.

3. This is not a situation in which it is even arguably appropriate to relax the bar of standing. Even if it were a proper ground for bending the rules, there is here no risk that fundamental constitutional principles or important legislative goals will go unenforced if private citizens are not allowed to vindicate them in the courts. *Compare Flast v. Cohen*, 392 U.S. 83, 98 n.17, 116 (Fortas, J., concurring) (1968). Under our submission, citizen suits for injunctive relief against persistent violators of the Clean Water Act are unaffected, as are actions to compel the administrators of the law to perform their assigned tasks. And, of course, the full arsenal of enforcement weapons, including civil and criminal penalties, remains available in governmental litigation.

Nor can Petitioners be heard to argue that the constitutional requirement of standing safely can be waived in the present context for the opposite reason: that barring private suits is pointless since the Government can always achieve the same assessment by initiating its own action. In this Court, it is unnecessary to elaborate the truth that adherence to the minimum constitutional standing requirements serves the fundamental principle of Separation of Powers and cannot be abandoned simply because, in a given context, it may make no practical difference. *See* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk L. Rev. 881, 892-93 (1983). Here, as where Federalism concerns are involved, the line of demarcation cannot be ignored simply because pragmatic considerations (albeit put forward by the Solicitor General) suggest it. *See Alden v. Maine*, No. 98-436, 1999 U.S. LEXIS 4374, (June 23, 1999), at *92. Besides, as the Court wrote in *Alden*, "[t]he difference between a suit by the United States . . . and a suit by [private citizens] implicates a rule that the National Government must itself deem the case of sufficient importance to take action . . . ." *Id.* at 92.

A final word is appropriate. Much of the law of standing, from *Frothingham v. Mellon*, 262 U.S. 447 (1923), onward, has been announced in cases where a citizen was suing Governmental officers who, allegedly, were violating the Constitution itself or a duty imposed by Congress. In that context, one can more readily appreciate the counter-arguments for relaxing standing, lest the law be set at naught. Even so, it has been suggested that stricter standards may be appropriate when the underlying claim, instead of a minority right which the political branches are less likely to vindicate, is a "majoritarian" one, typically a complaint that the relevant administrative agency has injured the public at large, and incidentally the plaintiff, by failing to enforce the law against a particular violator. Scalia, *supra*, at 894-95. While adopting that distinction, we go further.

In a case like the present (as has been said), there is no ground for apprehension that the law will go unenforced. But, more fundamentally, when the citizen is acting as a "private attorney general," who, far from asserting any right against Government, is seeking to vindicate the public (or governmental) interest, one ought to be cautious in too generously conceding standing. *Cf. Linda R.S.*, 410 U.S. at 617-19. The lawsuit may, after all, be in derogation of the legitimate prosecutorial discretion constitutionally assigned to the Executive Branch under Article II—a Constitutional transgression of Separation of Powers which would be beyond the power of the court to arrest once it has allowed the suit to go forward.[8] Although it was addressed to a different question, we invoke here the Court's warning in *Gwaltney* against an "interpretation of the scope of the citizen suit [that] would change the nature of the citizen's role from interstitial to potentially intrusive." *Gwaltney*, 484 U.S. at 61. The only proper course, we submit, is to insist that the citizen plaintiff is seeking a remedy that is related, immediately, directly and without excursions into foreign territory, to his own injury. *Cf. Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-562 (1992). An injunction will satisfy that test; an assessment of penalties payable only to the Treasury does not.

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[8]Actual conflicts between citizen suits and Governmental enforcement actions may have been largely eliminated by the requirement of a 60-day notice to the agency before filing suit, together with the opportunity given to the Government to pre-empt the litigation (33 U.S.C. § 1365(b)), supplemented by the later-added requirement of like notice before any consent judgment is entered in a citizen suit (33 U.S.C. § 1365 (c)(3)). But under the *Gwaltney* regime there remains the serious anomaly of an assessment of penalties, payable to the Treasury, when the Government, for good reason, has determined not to file suit and does not deem such penalties appropriate in all the circumstances.

CONCLUSION

For the reasons stated, the judgment below should be affirmed, at least insofar as it vacates the assessment of civil penalties against Respondent.

Respectfully submitted.

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July 19, 1999

APPENDIX 1A

SAN FRANCISCO BAYKEEPER V. VALLEJO SANITATION AND FLOOD CONTROL DISTRICT, CIV-S-96-1554 DFL (E.D. CAL. MAY, 28, 1998) (UNPUBLISHED MEMORANDUM OF OPINION AND ORDER ON SUMMARY JUDGEMENT MOTION)

THE THREE ORDERS WHICH COMPRISE THIS APPENDIX WERE REPRODUCED FROM THE SIGNED ORIGINALS. NO ATTEMPT TO CORRECT ERRORS, TYPOGRAPHICAL OR OTHERWISE, HAS BEEN MADE.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

SAN FRANCISCO BAYKEEPER,

Plaintiff

v.

VALLEJO SANITATION AND FLOOD CONTROL DISTRICT,

Defendant

No. CIV-S-96-1554 DFL

MEMORANDUM OF OPINION AND ORDER

Plaintiff San Francisco BayKeeper ("BayKeeper") brings suit charging defendant Vallejo Sanitation and Flood Control District (the "District") with violating the Clean Water Act, 33 U.S.C. §§ 1251-1387. BayKeeper alleges that the District has discharged pollutants into the San Pablo Bay and San Francisco Bay Estuary at Mare Island Strait and Carquinez Strait in violation of its NPDES permit. BayKeeper also alleges that the District has violated the permit's reporting requirements. The parties have filed cross-motions for summary judgment as to defendant's liability for the alleged violations.

I.

The District operates a Publicly Owned Treatment Works ("POTW") and provides sanitary-sewer and flood protection services for the City of Vallejo. The POTW treats wastewater from the Vallejo area, and discharges effluent through two outfall pipes, one in the Carquinez Strait and the other in Mare Island Strait. The Clean Water Act §§ 1311-1342 prohibits the discharge of pollutants into navigable waters except as authorized under a National Pollutant

Discharge Elimination System ("NPDES") permit. Such a permit states that the terms under which the acquiring party must operate, including types and amounts of pollutant emissions allowed (i.e., effluent limitations), discharge prohibitions, self-monitoring requirements, and reporting requirements. Discharges from the District's POTW are governed by NPDES Permit No. CA0037699 (the "Permit"), which was issued by the California Regional Water Quality Control Board (the "Board") in late 1988.

Violations of an NPDES permit are violations of the Clean Water Act. Hawaii's Thousand Friends v. Honolulu, 821 F.Supp. 1368, 1392 (D. Haw. 1993). "The Clean Water Act imposes strict liability for NPDES violations and does not excuse 'de minimus' or 'rare' violations." Id. (citing Sierra Club v. Union Oil Co. of Cal., 813 F.2d 1480, 1491 (9th Cir. 1988), vacated for reconsideration, 485 U.S. 931 (1988), reinstated and amended, 853 F.2d 667 (9th Cir, 1988)). A plaintiff may establish a violation of an NPDES permit by comparing limitations imposed by the permit with the self-monitoring reports of the discha[illegible]er. Sierra Club, 813 F.2d at 1492. The data contained i[illegible] self-monitoring reports are to be considered "conclusive [illegible]idence of an exceedence of a permit limitation." Id. The defendant's "intent" and "good faith" and the degree of the violations are irrelevant to the issue of liability, and are considered only in the penalty phase of the litigation. Hawaii's Thousand Friends, 821 F.Supp. at 1392 (citations omitted).

II.

The court concludes that summary judgment is appropriately granted to BayKeeper for violations by the District of permit effluent limitations and reporting requirements. Whether these violations are significant or merely trivial or technical must await the penalty phase.

The District makes a number of preliminary arguments that purport to identify jurisdictional or constitutional bars to a finding of liability. First, the District claims that BayKeeper

may not bring this citizen enforcement action because the Board has declared that the District is in compliance with its NPDES permit. However, the Clean Water Act permits a citizen suit by "any citizen" against "any person" alleged to be in violation of an NPDES permit. 33 U.S.C. § 1365. Although a citizen suit may be precluded when state or federal enforcement actions are underway, there is no preclusion or estoppel effect from a regulatory agency's decision not to take an enforcement action. See, e.g., Citizens for a Better Env't v. Union Oil Co. of Cal., 83 F.3d 1111, 1119-1120 (9th cir. 1996), cert. denied 117 S. Ct. 789 (1997). Thus, while the Board's view of the District's performance is relevant at the penalty stage, the Board's apparently favorable opinion of the District does not bar BayKeeper from bringing this action.

Second, the District claims that if the court imposes the remedies that BayKeeper seeks this would constitute a violation of the District's due process rights and would amount to a taking. This argument is directed particularly to the chlorine and bypass/overflow limits in the permit. According to the District, when these limitations were imposed the Board knew that the District would not be able to avoid violations but nonetheless included these standards in the permit with the comment and assurance that in considering enforcement action the Board would take into consideration the effects of weather and the District's diligence in pursuing various capital improvements. The District did not seek a modification of the permit or challenge the permit in State court and may have waived any right to challenge the permit's limitations in the context of a taking claim.

Assuming that the District has not waived a challenge to the permit and that a citizen suit could be viewed as working a taking, the District's taking contention is not ripe for review. At the penalty stage the court will determine whether or not the District could have complied with the permit and what penalty, if any, is appropriate. Once these

issues have been resolved, the court will return to the taking argument if the District chooses to advance it.

Third, in its reply brief to its motion, apparently as an afterthought, the District claims that the citizen suit provision of the Clean Water Act violates Article II of the U.S. Constitution. This argument appears for the first time in the District's brief, is made after the motion filing deadline, and does not allow BayKeeper an opportunity to respond prior to oral argument. Moreover, the untimeliness of the argument also hinders the court's ability to certify the constitutional question to the Attorney General without undue delay to this litigation. See 28 U.S.C. § 2403. The District's claim that its challenge is only to the provision "as applied" is of no force given that the District claims that the citizen suit provision usurps powers allocated to the President in the "take care" and appointments clauses. In these circumstances, the court deems this argument waived.

Fourth, the District seeks to use the "single operational upset defense"- - a penalty phase mitigation concept - - as the basis for a jurisdictional challenge under Gwaltney of Smithfield v. Chesapeake Bay Foundation, 108 S. Ct. 376 (1987). Section 1319(d) of the Clean Water Act lists the factors that a court should consider in calculating civil penalties for Permit violations:

> In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith effort to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require. For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

33 U.S.C. § 1319(d) (emphasis added).

By its express terms, the "single operational upset" concept is limited to subsection 1319(d). Thus, it is solely applicable to the fixing of the penalty. As stated by the Third Circuit:

> We note initially that the single operational upset ("SOU") defense is not a defense to liability, but relates only to the amount of penalties the district court may impose [footnote]. The SOU defense is contained in subsections relating to calculation of penalties . . . and by its terms it is limited to the subsection in which it is contained. Thus even if we were to find that [the discharger] was entitled to invoke the SOU defense, this would not preclude summary judgment on liability.

Public Interest Research Group of New Jersey v. Powell Duffryn Terminals, Inc., 913 F.2d 64, 76 (3rd Cir. 1990), cert. denied 498 U.S. 1109 (1991). Furthermore, the single operational upset concept applies only to collapse simultaneous violations of different effluent limitations into a single violation; it does not direct that multiple days of violations of any one parameter should be deemed a single violation if the consequence of an operational upset. It follows that multiple days of violations of an effluent limitation need not be considered as a single day of violation, although the court would have discretion to do so in setting a just penalty.

The District argues that many of the violations can be collapsed into one under the single operational concept and that when so viewed BayKeeper has failed to show the jurisdictional prerequisite of ongoing violations, at least as to certain of the effluent limitations, particularly the chlorine limitation. Under the Clean Water Act, in order to prevail on the merits, a citizen plaintiff must prove ongoing violations or a reasonable likelihood of continuing future violations of the Act. Sierra Club v. Union Oil Co. of Cal., 853 F.2d 667, 670 (9th Cir. 1988), citing Gwaltney of Smithfield v. Chesapeake Bay Foundation, 108 S. Ct. 376, 386 (1987). In the Ninth Circuit, a citizen plaintiff may prove that a violation is ongoing "either (1) by proving violations that continue on or after the date the complaint is filed, or (2) by

adducing evidence from which a reasonable trier of fact could find a continuing likelihood of a recurrence in intermittent or sporadic violations." Sierra Club, 853 F.2d at 671 (citation omitted).

Even assuming that BayKeeper must show that violations are ongoing as to each effluent limitation, BayKeeper has done so by proving violations, parameter by parameter, occurring after the complaint was filed.[1] It need prove no more. Further, the District's attempt to collapse various of the violations into one fails; as noted above, the statute does not deem multiple violations of the same effluent limitations as if it were but one.

The District makes a further preliminary argument, which is not jurisdictional but which is a basic theme of its defense to liability. The Permit expressly gives discretion to the District to decide whether certain violations should give rise to enforcement actions. The District argues tautologically that the exercise of this discretion defines the violation such that there is no violation unless the District concludes that there has been one. This is something of a variation on the argument, addressed above, that the District's finding of compliance will bar a citizen suit.

The Permit lists certain "Discharge Prohibitions" at Section A. These prohibitions forbid bypasses or overflows of untreated or partially treated wastewater "other than during peak wet weather flows in excess of the five-year design storm." In Section B, the Permit includes effluent limitations for various parameters such as chlorine residual and total suspended solids. The numerical limitations are prefaced with the statement that "Effluent discharged shall not exceed the following limits." In Section D, the Permit addresses the District's compliance decisions:

[1] For example, the evidence reveals that after the complaint was filed the District discharged chlorine in excess of the 0.0 mg/l limitation on approximately 212 occasions at Carquinez Strait and on approximately three occasions at Mare Island Strait.

4. In reviewing compliance with Effluent Limitation B.1.a. and B.1.b for Daily Maximum Limits, and B.2. of this Order, the Board will take special note of difficulties encountered in achieving compliance during wet weather periods when ordinary treatment capabilities are impeded by peak flows and storm-water diluted influent.

5. The discharger shall achieve full compliance with Prohibitions A.1., A.2., and A.3. of this Order for wet weather flows by completing the proposed Wet Weather Treatment Facilities and the current Infiltration/Inflow Corrections Program improvements in accord with the following time schedule. [The permit includes two identified construction projects and improvements as well as a completion date for the task]

6. Violations of Prohibitions A.1., A.2. and A.3. of this Order which occur as a result of wet weather flows prior to completion of the collection system and treatment facility improvement projects identified above shall be evaluated by the Board on a case by case basis, taking into account the degree of progress being made by the Discharger toward satisfactory completion of these improvements.

The language quoted above will not sustain the District's contention that there can be no violation unless the Board finds that the District is out of compliance with the District's improvement program. The Permit defines the Board's prosecution policy; it does not define violations or prohibitions according to the District's tautology.[2]

[2] It is doubtful whether a Permit could define effluent limitations and other prohibitions in the open-ended fashion advocated by the District and still be consistent with the Clean Water Act's anti-backsliding provisions. See 33 U.S.C. § 1342(o).

III.

The District's arguments above are advanced as to all of the limitations in the Permit. In addition, the District makes specific arguments as particular effluent and bypass/overflow limitations.

A. Chlorine Residual

BayKeeper claims that on numerous occasions, both before and after the filing of the Complaint, the District violated the Permit's chlorine residual limitation of 0.0 mg/1.

The District claims that it would be impossible to comply with the 0.0 mg/1 limitation, and that to hold it to that standard would be unconstitutional. For the reasons discussed above, this argument is properly considered at the penalty phase of the litigation.[3]

The District further contends that it is not bound by the 0.0 mg/1 standard because the Board's chlorine residual enforcement guidelines ("CREG") states that a chlorine residual discharge of 3.3 mg/1 is acceptable. However, the CREG is merely an enforcement guideline going to the Board's prosecutorial discretion and does not modify the 0.0 mg/1 limitation of the Permit. See, e.g., Citizens for a Better Env't v. Union Oil Co. of California, 83 F.3d at 1119-1120. Moreover, there are strict federal and state regulations, substantive and procedural, for modifying an NPDES permit.

[3] The court notes that if the District believed its NPDES Permit to be unreasonable, it had at least two remedies. First, within 30 days of the Permit's issuance, the District could have petitioned for review of the permit and ultimately may have sought review of the Permit in state court. See Cal. Water Code §§ 13320, 13324, and 13325. Additionally, as described in the text, the District could have sought a modification of its Permit.

Moreover, a challenge to provisions contained in an NPDES permit is a mater for the Water Board, and not for this court. California Pub. Interest Research Group v. Shell Oil Co., 840 F.Supp. 712, 718 (N.D. Cal. 1993).

Id. at 1120; see Cal. Code Regs. tit. 23, § 2235.2; 40 C.F.R. §§ 122.62, 122.63, 123.25(22), 124.10-17. A modification requires a finding of cause by an enforcement agency, preparing a draft permit, and public notice requirements. See e.g., Citizens for a Better Env't v. Union Oil Co. of Cal., 861 F.Supp. 889, 899 n.2 (N.D. Cal. 1994), aff'd 83 F.3d 1111 (9th Cir. 1996), cert. denied 117 S. Ct. 789 (1997). The modification requirements "cannot be evaded with the cooperation of compliant state regulatory authorities." Union Oil Co., 83 F.3d at 1120. "Unless properly modified in accordance with these procedures, the permit as originally issued remains in effect, and violations of the permit may be subject to a citizen enforcement suit." Union Oil Co., 861 F.Supp. at 899 n.2 (citations omitted). There is no evidence showing that the District or the Board, by way of CREG, complied with mandatory modification requirements with respect to the 0.0 mg/1 limitation on chlorine residual discharges.

B. Total Suspended Solids

For total suspended solids ("TSS") the Permit provides that discharges must not exceed a daily maximum of 60 mg/1, a weekly average of 45 mg/1, and a monthly average of 30 mg/1. According to the District it did not violate the TSS limitations because the Permit states: "In reviewing compliance with effluent limitations, the Board will take special note of difficulties encountered in achieving compliance during wet weather periods when ordinary treatment capabilities are impeded by peak flows and storm-water diluted influent." However, as already discussed, this provision guides the Board's prosecutorial discretion and does not abrogate the Permit's express effluent limitations as to TSS.

Defendant has violated the TSS effluent limitations on several occasions, and at least on two occasions after the complaint was filed.

C. Copper

At Carquinez Strait, a deep water outfall, the effluent limitation on copper is 200 micrograms (ug)/1. The limit at the Mare Island Strait outfall is 20 ug/1. The District has exceeded the effluent limitation on Cooper at Mare Island Strait on numerous occasions before and after the filing of the complaint.

The District concedes that it exceeded the 20 ug/1 limitation; however, it claims that on those occasions there was a wet weather condition such that the Mare Island Strait outfall was acting as a deep water outfall and should be held only to the 200 ug/1 limitation.[4] However, the Permit does not state or imply that during wet weather months the 20 ug/1 limitation for Mare Island Strait converts into a 200 ug/1 limitation. The District bases its argument on material external to the Permit - - principally, the draft permit now under consideration. The court may consider the draft permit and the conditions in which the Mare Island outfall copper limits were exceeded at the penalty stage.

D. Settleable Matter

As to settleable matter, the Permit provides that discharges must not exceed an instantaneous maximum of .2 ml/hr and a monthly average of .1 ml/hr. The record indicates that the District has violated these limitations prior to and subsequent to the filing of the complaint. Defendant claims that some of the exceedences should not be considered because they were

[4] During dry weather the District discharges its waste into Carquinez Strait. During wet weather the District is permitted to divert certain discharges from Carquinez Strait into the more shallow waters of Mare Island Strait. During wet weather, the District may blend partially treated wastewater with fully treated wastewater when making discharges into Carquinez Strait. However, the District may only discharge fully treated wastewater into Mare Island Strait.

not detected as part of its official monitoring program. Again, the District is making a mitigation argument as if it could define liability. The Permit does not grant safe harbor for violations that are detected in monitoring that exceeds the monitoring required by the Permit. While the District's assiduous monitoring may factor into the penalty decision, a violation is a violation no matter the source of the information.

E. Median and Total Coliform

The Permit imposes a limitation of 240 MPN (Most Probable Number)/100ml for median coliform and 10,000 MPN/100ml for total coliform. The evidence shows that the District has violated these effluent limitations prior to and after the filing of the complaint.

F. Bypass/Overflow Limitations

The permit prohibits "[t]he bypass or overflow of untreated or partially treated wastewater to waters of the State, either at the treatment plant or from the collection system or pump stations tributary to the plant, other than during peak wet weather flows in excess of the five-year design storm, as defined in the Discharger's Sewer System Evaluation Survey (January 1988)." According to the District's Sewer System Evaluation Survey, a "five-year design storm" is a rain event having a duration of four hours, an intensity of 0.4 inches per hour, and a total volume of 1.6 inches. BayKeeper claims that the District violated this prohibition over 2,000 times, 500 of which occurred after the complaint was filed.

According to the District it has complied with the Permit's bypass and overflow provisions. The District states that at the time that the Permit was issued, the Board implemented a 9-year program for the District to make improvements to its treatment facility that would enable it to address its overflow problems. The Permit required that these improvements be completed by December 15, 1996, and provided that the

Board would evaluate violations occurring as a result of wet weather on a "case by case basis, taking into account the degree of progress being made by the Discharger toward satisfactory completion of these improvements." As discussed above, this language of the Permit is directed to the Board's enforcement policies and not to the definition of a violation.

The District also claims that discharges of less than 1,000 gallons are not violations of the Permit because under California law it did not have to report those violations. See 23 CCR §§ 2250, 2260. However, the regulations do not purport to modify NPDES permits. The District's Permit does not exclude discharges of less than 1,000 gallons from the overflow and bypass provisions.

IV.

BayKeeper claims that the District violated the Permit's Follow-Up Letter requirement on 1,109 occasions.[5] The Permit states that reports of Permit violations must be submitted to the Regional Board:

> In the event the discharger violates or threatens to violate the conditions of the waste discharge requirements and prohibitions or intends to experience a plant bypass or treatment unit bypass . . . the discharger shall notify the Regional Board office by telephone . . . and confirm this notification in writing within 7 working days of the telephone notification. The written report shall include time and date, duration and estimated volume of waste bypassed, method used in estimating volume and person notified of the incident. The report shall include pertinent information explaining reasons for the noncompliance and shall indicate what steps were taken to prevent the problem from recurring.

Def.'s Exs., Ex. D, p. 10.

However, the Permit states that the "Regional Board may waive [written report requirement] on a case-by-case basis."[6] According to the District, on February 10, 1989 the Board informed the District that bypasses and overflows of 1,000 gallons or more should be reported by telephone and that a written report would be required only if requested by the Board. See Allen Decl. Ex. F. The District argues that the follow-up letter requirement only applies to bypasses and overflows, and that as to bypasses and overflows, the District has waived the requirement.

The first part of the District's argument founders on the language of the Permit. In A.G.2 the reporting requirement is triggered by a violation of the Permit's "waste discharge requirements and prohibitions or . . . a plant bypass." (Emphasis added). Similarly 10.c. applies to "[a]ny upset that exceeds any effluent limitation in the permit: in addition to "[a]ny unanticipated bypass that exceeds any effluent limitation in the permit." Thus, the reporting requirement is not limited to bypasses and overflows; any violation of the Permit's "waste discharge requirements and prohibitions" must be followed by a written report.

The waiver argument fails because no evidence has been provided that the Regional Board waived the written report on a "case-by-case basis." At best, the evidence shows that Blair Allen, a staff member of the Board, told the District

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[5] BayKeeper has withdrawn its allegations that the District violated cover letter and monitoring provisions contained in the Permit.

[6] The waiver provision appears at C.10.c and is part of a reporting section that addresses noncompliance that may endanger health or the environment. Reports under C.10 must be made orally within 24 hours. A written report must follow within 5 working days. The interplay of the C.10 standard reporting requirements with the particularized reporting requirements in part A.G.2 is confusing, particularly in light of language at part B.IV.C: "Any overflow, bypass or significant non-compliance incident that may endanger health or the environment shall be reported according to sections G.1 and G.2 of Part A."

that follow-up written reports were not necessary and that the Board so instructed the 120 public agencies responsible for sewage systems within the Board's area of supervision. Such blanket advice does not amount to a "case by case" waiver as called for by the Permit. Of course, the Board's advice will be taken into consideration at the penalty stage.

V.

The parties dispute what is meant by a "day" of violation. For the reasons stated by BayKeeper the court finds that a "day" of violation as used in 33 U.S.C. § 1319(d) refers to a calendar day and not to any 24 hour period.

VI.

The court declines to decide the precise number of days of violation by the District on the current briefing. With this reservation, BayKeeper's motion for summary judgment on liability is GRANTED and the District's motion for summary judgment on liability is DENIED.

IT IS SO ORDERED.

Dated: May 27, 1998.

/s/

DAVID F. LEVI

United States District Judge

APPENDIX 1B

SAN FRANCISCO BAYKEEPER V. VALLEJO SANITATION AND FLOOD CONTROL DISTRICT, CIV-S-96-1554 DFL, (E.D. CAL. MARCH 1, 1999) (UNPUBLISHED MEMORANDUM OF OPINION AND ORDER ON MOTION TO DISMISS)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

—

SAN FRANCISCO BAYKEEPER,

Plaintiff

v.

VALLEJO SANITATION AND FLOOD CONTROL DISTRICT

Defendant.

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CIV-S-96-1554 DFL

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MEMORANDUM OF OPINION AND ORDER

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Plaintiff San Francisco BayKeeper ("BayKeeper") brings suit against Vallejo Sanitation and Flood Control District (the "District"), asserting violations of the Clean Water Act ("CWA") 33 U.S.C. § 1251-1387. Relying on certain language in the Supreme Court's recent decision in Steel Company v. Citizens for a Better Env't, 118 S. Ct. 1003 (1998), the District contends that Baykeeper lacks standing to assert a claim for civil penalties.[1]

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[1] The District urges the Court to give preclusive effect to a partial grant of summary judgment in San Francisco Baykeeper v. Cargill, No. 96-02161 (N.D. Cal. Nov. 19, 1998), in which the district court held that Steel Company "established an absolute rule of law that if a plaintiff is not entitled to recover the penalties sought in the action . . . the plaintiff does not have standing under Article III of the Constitution to seek such penalties." Id. at ¶ 4. However, "[o]nly a final judgment that is sufficiently firm can be issue preclusive." Robi v. Five Platters, Inc., 838 F.2d 318, 326 (9th Cir. 1988) (citation and internal quotations omitted). No final judgment has been issued in Cargill under Federal Rule of Civil Procedure 54(b), and orders issued prior to judgment are subject to

Redressability - - "a likelihood that the requested relief will redress the alleged injury" - - is one of the three constitutional requirements for standing, in addition to injury in fact and causation. Id. at 1017. The District interprets Steel Company to hold that civil penalties paid to the federal government can never redress the injury of a citizen-plaintiff for Article III purposes, because the penalties are not paid to the plaintiff.

The District reads Steel Company too broadly. Steel Company held only that a claim for civil penalties paid to the federal government could not support Article III standing for a citizen-plaintiff alleging wholly past injuries; its holding did not embrace cases involving allegations of ongoing harm. See 118 S. Ct. at 1018-19. The plaintiff in Steel Company brought a citizen suit under the Emergency Planning and Community Right-to-Know Act of 1986 ("EPCRA"), which requires users of certain toxic and hazardous chemicals to file annual reports detailing how they used and disposed of the chemicals to file annual reports detailing how they used and disposed of the chemicals. See id. at 1008-9. At the time the plaintiff filed suit, the defendant was in complete compliance with EPCRA. See id. at 1009. The plaintiff did not allege a violations. See id. at 1019 (noting that the complaint contained no allegation of "a continuing violation or the imminence of a future violation"). In this setting, the Curt found that payment of finds to the Treasury could not satisfy the redressability requirement because the fines did not go to the plaintiff and "psychic satisfaction is not an acceptable Article III remedy." Id. at 1019.

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reconsideration by the district court. In these circumstances no preclusive effect ought be given to the provisional decision of the district court in Cargill. See St. Paul's Fire and Marine Ins. Co. v. F.H., V.W., 55 F.3d 1420, 1425 (9th Cir. 1995); Avondale Shipyards v. Insured Lloyd's, 786 F.2d 1265, 1269 (9th Cir. 1986).

Steel Company did not disturb the Court's prior decision in Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc. 484 U.S. 49, 108 S. Ct. 376 (1987), which held that a citizen-plaintiff may seek civil penalties under the CWA if there is an allegation of "continuous or intermittent" violations. See, id. at 57, 108 S. Ct. at 381. Under Gwaltney, allegations of continuing violations are sufficient to confer Article III standing to seek civil penalties. See id. at 64, 108 S. Ct. at 385. If the Court in Steel Company intended to overrule Gwaltney, surely it would have said so. Yet the opinion, if anything, ratified Gwaltney's finding of Article III jurisdiction in the presence of continuing violations. Steel Company, 118 S.Ct. at 1011.

The District counters that the Court in Steel Company made no distinction between past and ongoing violations in holding that civil penalties could not remedy a citizen-plaintiff's injury. But the Court was not called upon to address the situation in which ongoing violations are alleged.

There is no question that Baykeeper has standing to seek injunctive relief based on its claim of present and future violations. See Steel Company, 118 S. Ct. at 1019 ("if [plaintiff] has alleged a continuing violation or the imminence of a future violation, the injunctive relief request would remedy that alleged harm"). In the context of ongoing violations, civil penalties are similar to injunctive relief. They both deter future violations by a particular defendant thereby redressing threatened harm to the plaintiff. And they operate in similar fashion; injunctive relief is backed by the contempt power and deters in large part by the threat of monetary sanctions just as civil penalties do. See Natural Res. Defense Council Inc. v. Texaco Ref. & Mktg. Inc., 2 F.3d 493, 503 n.9 (3d Cir. 1993) ("Citizen file actions [under the CWA] primarily to deter future violations by the named defendant and other potential polluters, and the imposition of penalties significantly enhances the deterrent effect of a citizen suit."). Steel Company's reasoning thus does not

support the denial of standing to citizen penalties if they allege ongoing or continuous violations by the defendant.[2]

Under the Steel Company standard, Baykeeper has standing to seek civil penalties. Baykeeper's complaint alleges that the District's violations of its NPDES permit are "ongoing, continuous or intermittent and in all likelihood will continue to occur." (Compl. ¶ 27.) Baykeeper's allegations of future injury are particular and concrete. In granting summary judgment for Baykeeper on the issue of liability, the court has already found that Baykeeper has proven "violations, parameter by parameter, occurring after the complaint was filed." (May 28, 1996 Memo. of Opinion and Order at 7.) Moreover, Baykeeper has submitted evidence of even more recent violations by the District.[3]

[2] A rule denying citizen-plaintiffs standing to seek civil penalties, whether or not there is an allegation of ongoing injury and violation, would be a rather dramatic development in the law given that civil penalties payable to Treasury are an enforcement tool available in citizen suits under a number of environmental statutes. See, e.g., 42 U.S.C. § 7604(a) (Clean Air Act); 42 U.S.C. § 6972(a) (1) (A) (Resource Conservation and Recovery Act of 1976); 42 U.S.C. § 9659(a) (1) & (c) (Comprehensive Environmental Response, Compensation, and Liability Act). Nothing in Steel Company suggests the Court intended to effect such a fundamental change in these remedial schemes.

[3] The District advances two mootness cases decided in the wake of Steel Company, but they are distinguishable. Neither Friends of the Earth, Inc. v. Laidlaw Env'tl Serv. Inc., 149 F.3d 303 (4th Cir. 1998), petition for cert. filed, 67 U.S. L.W. 3364 (Nov. 9, 1998) (No. 98-822), nor Dubois v. U.S. Dep't of Agric., 20 F.Supp.2d 263 (D.N.H. 1998), involved allegations of ongoing CWA violations. In contrast, Baykeeper not only has alleged ongoing violations by the District, but has bolstered those allegations with concrete evidence.

For the foregoing reasons, the District's motion to dismiss and its motion for leave to file a supplemental answer are DENIED.

IT IS SO ORDERED.

Dated: March 1, 1998.

/s/
DAVID F. LEVI
United States District Judge

APPENDIX 1C

SAN FRANCISCO BAYKEEPER V. CARGILL SALT DIVISION,
NO. C96-02161 CAL (N.D.CAL. NOV. 19, 1998)
(UNPUBLISHED ORDER ON PRETRIAL AND IN LIMINE MOTIONS)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

—

SAN FRANCISCO BAYKEEPER; CITIZENS COMMITTEE TO COMPLETE THE REFUGE,

Plaintiffs

v.

CARGILL SALT DIVISION; CARGILL, INCORPORATED,

Defendants

—

No. C 96-02161 CAL

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ORDER ON PRETRIAL AND IN LIMINE MOTIONS

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The Pretrial Motions of Plaintiffs San Francisco BayKeeper and Citizens Committee to Complete the Refuge ("Plaintiffs"), and the Motions in Limine of Defendants Cargill Salt and Cargill, Incorporated ("Cargill") regularly came on for hearing before the Honorable Charles A. Legge, in the above-entitled court, on September 2, 1998. Plaintiffs appeared by Helen H. Kang and Eb F. Luckel of Goodman/Kang. Cargill appeared by Edgar B. Washburn and Sandi L. Nichols of Washburn, Briscoe & McCarthy.

Having read and considered all of the pleadings, records, motions, briefs, and oral and written testimony submitted by the parties on the issues raised by the respective motions, the following findings and orders were made, as set forth in more detail in the transcript of the September 2, 1998 hearing on these motions, which is attached hereto and incorporated herein by reference:

1. The remaining plaintiffs in the action are San Francisco BayKeeper and Citizen's Committee to Complete the Refuge. Michael Lozeau is no longer a plaintiff following

this Court's ruling in January, 1998 that he did not have standing to bring this action, and, thus, he is not a party to the pretrial motions. The remaining plaintiffs do have representational standing to sue on behalf of their respective members. (Sierra Club v. ALCOA, 585 F. Supp. 842 (N.D.N.Y. 1984). The Court makes no ruling on Cargill's motion that the remaining plaintiffs lack organizational standing to sue "on their own behalf." Instead, the Court will allow plaintiffs to amend their first amended complaint to allege facts to establish organizational standing. Cargill can challenge the amended pleading if it deems it appropriate.

2. The Court has previously found, in connection with the motions on summary adjudication, that there was harm to the "pond." This was an element of the Court's ruling granting plaintiffs' motion for summary judgment on liability. Plaintiffs do not again need to establish harm to the "pond" to establish their standing.

3. The plaintiffs have established representational standing and do not need to put on any further evidence of their representational standing at trial. The issue of whether plaintiffs have organizational standing remains an open and unresolved issue.

4. Neither San Francisco BayKeeper nor Citizen's Committee to Complete the Refuge have standing to seek civil penalties in this action. The U.S. Supreme Court, in Steel Co. v. Citizens for a Better Environment, 140 L. Ed. 2d 210 (1998), established an absolute rule of law that if a plaintiff is not entitled to receive the penalties sought in the action, such as here, where any penalties would go to the U.S. Treasury, the plaintiff does not have standing under Article III of the Constitution to seek such penalties. The penalties would not redress any injury of plaintiffs, as explained by the Steel Co. court. (See also Friends of the Earth v. Laidlaw Environmental, 1998 U.S. App. LEXIS 16298 (4th Cir. July 16, 1998).)

5. The plaintiffs' March 25, 1996 60-day notice, as well as their supplemental 60-day notice of November 8, 1996, do not provide the requisite specificity to permit this Court to

accept jurisdiction over any alleged discharges before 1991. The notices failed to provide sufficient information from which Cargill could identify any dates prior to 1991 on which they allegedly had violated the Act. This is further demonstrated by the fact that the injunctive relief mentioned in the 60-day notices and the complaint seeks only the prevention of future violations and not a required cleanup. The 60-day notices were sufficient to confer jurisdiction only over acts taken beginning March 25, 1991.

6. Whether the five-year statute of limitations of 28 U.S.C. § 2462 applies to the plaintiffs' claims for injunctive relief is the subject of a later hearing to be held on November 20, 1999.

7. To the extent there are remaining pretrial motions or motions in limine not addressed by the above rulings, the Court makes no ruling on them at this time. The parties may renew such motions at a later date if they deem it necessary.

IT IS SO ORDERED.

Dated: November 19, 1998.

/s/

CHARLES A. LEGGE

United States District Court Judge

FILED
JUL 20 1999
OF THE CLERK

No. 98-822

In the Supreme Court of the United States

OCTOBER TERM, 1998

FRIENDS OF THE EARTH, ET AL.,
PETITIONERS,

v.

LAIDLAW ENVIRONMENTAL SERVICES (TOC), INC.,
RESPONDENT.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE STATE OF SOUTH CAROLINA AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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FRIENDS OF THE EARTH, ET AL.,
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LAIDLAW ENVIRONMENTAL SERVICES (TOC), INC.,
RESPONDENT.

BRIEF FOR THE STATE OF SOUTH CAROLINA AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS

The State of South Carolina has a unique interest in this case. Neither the agencies of the State nor persons doing business in the state should be subject to protracted federal litigation once compliance with environmental protection standards has been attained through administrative measures and state court consent decrees. Although the State is not a party to this case, South Carolina's environmental protection agency played a central role in the pre-litigation phase, and later found itself defending its actions in federal court after entry of the consent decree and long after respondent had fully complied with its NPDES permit.

STATEMENT

This case arises out of efforts to regulate the mercury level in the water discharges from an incinerator which the respondent operated from the late 1980's through September 1998. The history of the respondent's discharges, and of the varying standards which applied to them, is set forth in the trial court's opinions. The relevant standards are summarized below:

EPA standard since 1993 (or earlier)	200.0 ppb[1]
Standard applied to respondent by State, 1988-1993	1.3 ppb
Standard applied to respondent by State, 1993-1998 (plant closed in 1998)	10.0 ppb
Standard for drinking water	2.0 ppb
Discharges in excess of 10 ppb (new standard), 1991-92	14
Discharges in excess of 10 ppb (new standard), 1993-1995[2]	0

[1] Parts of mercury per billion.

[2] 1995 is the last year for which information is in the record.

As the above history indicates, *hindsight indicates that there has never been a substantial problem with compliance with the standard ultimately applied to this facility*. The standard which the State applied to the respondent in this case from 1988 through 1993 or 1994 was 1.3 ppb. EPA concluded in 1993 or earlier that much higher mercury levels (200 ppb) would be adequate to protect the environment. To put this in context, the standard for drinking water is 2 ppb. As a result, the State's initial permit limit was so strict that it required the respondent's discharge at the pipe, even before diluted by the river, *to contain 25% less mercury than is permitted in drinking water*. Even the State's revised standard, which began to apply in 1993, was only 10 ppb, one-twentieth the number which EPA has found acceptable.

Plaintiffs point to 489 occasions where the respondent's discharges exceeded the standard in effect at the time of monitoring. However, an examination of the detailed chart in the district court's opinion, *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 956 F. Supp. 588, 613-621 (D.S.C. 1997), shows that only 40 of those occasions involved a discharge in excess of 10 ppb, the standard which DHEC ultimately applied to this discharge permit. Only 14 of these 40 excursions occurred in 1991 or 1992, by which time the state environmental agency had been closely involved with the respondent's compliance for several years; the remaining 26 excursions occurred in the late 1980's. Respondent's operation never made a discharge which was anywhere close to the limit of 200 ppb which is an allowable daily maximum under the revised EPA Gold Book. Only four of respondent's discharges over the years were over 30 ppb, and no

discharge was as high as 40 ppb.

The measured water quality of the North Tyger River reflects the minuteness of the amounts of mercury discharged. The district court concluded that various studies conducted by the state agency and by the respondent all showed "that Laidlaw's actual discharges have [not] resulted in harm to the North Tyger River." 956 F.Supp. at 603. Far from resulting in harm, the discharges were so low that, as the district court held, "no fish in the river has a mercury level even one-quarter of a limit that is ten times lower than necessary to protect human health." *Id.* In other words, even if the mercury level in fish in the river had been 40 times higher than what was measured, it still would not have exceeded the level above which human health might be affected. As a result of these findings of fact, the district court concluded that "Laidlaw's effluent, even with the permit exceedances it has experienced, has had no demonstrated adverse effect on the environment." *Id.*

Despite the State's imposition of an exceedingly strict mercury discharge standard, both originally and as amended, the district court still concluded that the state environmental agency was not "diligently prosecuting" an enforcement action against Laidlaw. The agency thus managed to attain the singular distinction of appearing both too stringent and too lenient at the same time.

It is undisputed that, as the district court held, respondent "has been in substantial compliance with all parameters in its NPDES permit since at least 1992." 956 F.Supp. at 611. The district court further held that in 1994 and 1995, the most recent years covered by the record, there

were only two "violations," in the amounts of 2.7 ppb and 1.4 ppb, and that these, obviously, did not exceed the permit limit of 10 ppb which would have been in effect by then but for the plaintiffs' state administrative appeal of the revised state standard. *Id.* There was likewise only one discharge in excess of 1.3 ppb in 1993, *see* 956 F. Supp. at 621, and that discharge (1.6 ppb) was likewise well below the revised standard of 10 ppb.[3]

Although the state agency had imposed a civil penalty of $100,000 in 1992, based on violations of the later-vitiated 1.3 ppb standard, and although the district court concluded that "compliance with the prior, stricter standard was not absolutely necessary to avoid environmental harm," 956 F. Supp. at 610, that court nevertheless reviewed the penalty in detail and quadrupled it to slightly over $400,000. At the same time, however, the district court was satisfied that injunctive relief was not necessary in view of the respondent's compliance. 956 F. Supp. at 611. The citizen plaintiffs did not appeal the denial of injunctive relief.

On September 1, 1998, the last discharge of any sort issued from respondent's facility. The waste disposal system at the site, including the incinerator and the waste feed systems, was removed and discarded. Respondent's decision to cease incineration (which was based on market conditions rather than the events in this case) was embodied

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[3] The last evidence was taken in this case in July and August 1995. 956 F. Supp. at 592. The district court's order was delayed until January 1997 because of the possibility that state administrative proceedings might affect this case. *Id.*

in an agreement between the respondent and the state enforcement agency in June 1997. As a result of the closure of this plant, approximately 60 employees were terminated.[4]

SUMMARY OF ARGUMENT

Congress intended that EPA and the States would play the primary enforcement role in the protection of the nation's water ways pursuant to the Clean Water Act (CWA). That is precisely what took place in this case. Nevertheless, three individuals thereafter attempted to elevate a CWA "citizen suit" to the primary enforcement role placed in the hands of South Carolina, particularly its Department of Health and Environmental Control (DHEC). If petitioners are allowed to proceed with this case, CWA citizen suits will provide citizens and federal judges the opportunity to relitigate and second-guess the enforcement and permitting actions of South Carolina and other States, despite the *bona fide* decisions implemented in good faith by the States. Such a result will undermine the careful enforcement priorities established by Congress in the CWA as well as the role South Carolina played in regulating the facility at issue.

The State does not suggest that citizen suits are not a worthy tool for protecting the environment. In many situations, they may be the *only* tool available. On that basis, the State welcomes citizen suits as a general matter. However, Congress has decided that the federal courts

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[4] The facts stated in this paragraph are taken from the May 21, 1999 Affidavit of Charisse G. McLeod filed in support of respondent's Suggestion of Mootness filed with this Court on June 9, 1999.

should not hear such cases under these circumstances. The record in *this* case demonstrates that *this* citizen suit was superfluous, and did not play *any* role in the enforcement of the nation's environmental laws regarding this facility. The State of South Carolina invested six years of continuous enforcement and permitting effort to ensure that the permit holder achieved stringent and unprecedented permit standards, imposed on Respondent an appropriate fine for non-compliance, received state court approval of its compliance plan and, most importantly, ensured that there was not *any* harm to the environment from any of the facility's discharges. Of critical relevance to this case, these environmental enforcement results were achieved in response to the State's actions *before the mere filing of the citizens' suit*. There can be no dispute that, in this case, the public interest in vigorously protecting the environment was well-served by the State's active enforcement role, a role not shared by the citizen suit case brought by petitioners.

South Carolina, like many other States, works within the system of environmental enforcement envisioned by Congress under the CWA. The state agency played the primary role envisioned by Congress and, through its extensive activities, ensured that no harm came to the environment. It is the States, along with EPA, that are expected to set NPDES standards, issue permits, monitor compliance and resolve non-compliance. To accomplish this role, States are vested with enormous discretion to set reasonable permit limits, negotiate resolutions to complex environmental problems at a permitted facility, determine appropriate fines and penalties and, in all events, balance the equities in determining the public interest in a particular facility's operations. It is a system that makes perfect sense.

Indeed, Congress recognized that state governments are in the best position to assess the public interest to fashion and achieve environmental goals consistent with the public interest in protecting the environment. S. Rep. No. 92-414, at 64 (1971).

Given the critical role of the States, Congress envisioned an important but much more limited role for citizen suits where, as here, the State has taken the enforcement lead. 33 U.S.C. § 1365(b)(1)(A). Appropriately, such suits essentially fill gaps left open by States which, unlike South Carolina here, choose not to carry out their enforcement role. But citizen suits were not intended by Congress to intrude on state enforcement efforts, or to second-guess enforcement decisions. That is because they supplement, rather than supplant, the State's enforcement role, as this Court noted over ten years ago. *Gwaltney v. Chesapeake Bay Foundation*, 48 U.S. 49, 60 (1987).

Where citizen suits duplicate the efforts of active state agencies, they contravene Congressional intent. In such circumstances citizen suits no longer fill gaps left open by inactive or unmindful state agencies. Instead, they mimic enforcement actions meant to be conclusive, and create an uncertainty in the enforcement arena. The result is that the State's role as the primary enforcement tool is undermined, and its approach to enforcement is no longer comprehensive, efficient or cost-effective. The state agency's exercise of enforcement discretion – including, as here, state court consent decrees and jurisdiction to enforce such decrees –is seriously hampered by subsequent federal judicial review through a citizen suit. Resolution of permit

compliance issues through negotiation and open communication with permit holders becomes much more difficult. Consequently, pragmatic solutions to environmental issues by state agencies will be frustrated. Ironically, allowing such duplicative suits to proceed results in waterways that are less protected because of the confusion created by the uncertainty in the permit-holder's eyes as to whom they must look for enforcement guidance and direction – the state agency or the federal court litigation.

Such is the case here. The citizen suit currently before the Court is the kind of duplicative, intrusive action that is inconsistent with the comprehensive scheme for environmental protection envisioned by Congress.

ARGUMENT

In this case the Court has the opportunity to clarify the circumstances under which citizens may act in an "enforcement" role regarding alleged violations of federal environmental laws. The constitutional parameters of such suits are addressed in the briefs of the parties and will not be repeated here. Instead, *amicus* suggests that, in considering these parameters, the Court should strike the appropriate balance between the benefits of allowing private citizen litigation to enforce the CWA and the strong public policy of having States serve as the primary enforcement agencies to resolve environmental pollution discharge problems. In this case, that balance favors affirming the judgment of the Court of Appeals and dismissal of the case.

I. The Role of Citizen Suits

Under the Clean Water Act is Limited.

In this case, the Court confronts a citizen suit brought *after* a state agency had invested almost six years of monitoring, investigating and cooperating with a NPDES permit-holder to select appropriate equipment to achieve stringent and unprecedented environmental standards. Two days after a state court's entry of a consent decree (which included a civil penalty consistent with its penalty policy) petitioner citizen groups filed suit complaining that the State had not "done enough" in its extensive pre-complaint enforcement role, including the imposition of the $100,000 state court civil penalty. Tacitly acknowledging that their eleventh hour attempt to obtain federal court jurisdiction might not survive under this Court's decision in *Gwaltney*, petitioners alleged that the state court consent decree and $100,000 civil penalty somehow reflected a collusive and fraudulent act by the State and respondent. As expressly found by the trial court, however, there was no basis for these charges. *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 890 F.Supp. 470, 489 n.14 (D.S.C. 1995).

The Clean Water Act provides that private citizens may commence civil actions against a person who is alleged to be in violation of the conditions of a federal or state NPDES permit. 33 U.S.C. § 1365(a)(1). At the same time, however, there are important limitations on the rights of citizens to bring such suits. Both Congress and the Court have made clear that citizen suits *cannot* be brought (1) where the State (or EPA) is "diligently prosecuting" a civil or criminal action against the same permit holder (33 U.S.C. §§ 1365(b)(1)(B)), or (2) the citizens seek to remedy

violations cured by the time the suit is brought. *Gwaltney v. Chesapeake Bay Foundation*, 48 U.S. 49 (1987). More recently, in a case brought under a similar environmental statute (the Emergency Planning and Community Right-To-Know Act of 1986), the Court held that citizens do not have Article III standing to pursue civil penalties payable to the United States Treasury. *Steel Co. v. Citizens for a Better Environment*, 118 S. Ct. 1003 (1998). Such civil penalties were awarded by the trial court in this case, which as noted below, denied all injunctive relief to petitioners.

The Court first noted in *Gwaltney* that Congress intended citizen suits to proceed under the Clean Water Act *only* if "brought to enjoin or otherwise abate an ongoing violation." 484 U.S. at 59. *Gwaltney* made clear that "the citizen suit is meant to supplement rather than supplant governmental action." *Id.* at 60. The Court found support for its holding in the legislative history of the CWA, which demonstrates that States were to be the primary enforcers of the statute:

> The Senate Report noted that "the Committee intends the great volume of enforcement actions [to] be brought by the State," and that citizen suits are proper only "if the Federal, State, and local agencies fail to exercise their enforcement responsibility."

Id. at 60 (quoting S. Rep. No. 92-414, p. 64 (1971), *reprinted in* 2A Legislative History of the Water Pollution Control Amendments of 1972, p. 1482 (1973)).

Given the unmistakable intent of Congress, the Court

cautioned that citizen suits should not interfere with the exercise of discretion by agencies entrusted with oversight of environmental compliance:

> Suppose . . . that the Administrator [of the EPA] agreed not to assess or otherwise seek civil penalties on the condition that the violator take some extreme corrective action, such as to install particularly effective but expensive machinery, that it otherwise would not be obliged to take. If citizens could file suit, months or years later, in order to seek the civil penalties that the Administrator chose to forgo, then the Administrator's discretion to enforce the Act in the public interest, would be curtailed considerably. The same might be said of the discretion of state enforcement authorities. Respondents' interpretation of the scope of the citizen suit would change the nature of the citizens' role from interstitial to potentially intrusive. We cannot agree that Congress intended such a result.

Id. at 60-61. The record in *Friends of the Earth* presents in concrete terms the hypothetical concern first raised in *Gwaltney*. That record makes clear that this case should never have been allowed to proceed.

II. The State of South Carolina, Not the Citizen Suit, Played The Pivotal Enforcement Role.

A. History of State Agency Enforcement

The trial court allowed petitioners to pursue injunctive relief *and* civil penalties for technical violations by the NPDES permit-holder that had been the subject of extensive state enforcement proceedings and two consent decrees long before the citizen suit was filed. The September 1988 consent decree was the culmination of almost three years of state agency investigation, monitoring and negotiation with the NPDES permit-holder. During that time, the state agency imposed on Respondent a NPDES permit with a mercury limit far more stringent than for its predecessor – a reduction from 20 parts per billion (ppb) to 1.3 ppb for mercury.[5] 956 F. Supp. 588, 593 (D.S.C. 1997). Nonetheless, under the State's watchful eye, Respondent installed two different mercury reduction systems, and tested three others. By March 1991 these technical measures met the NPDES standard mandated by the State for all parameters except mercury. *Id.* at 594-95.[6] Accordingly, in early 1992, state officials began the initiation of an enforcement proceeding for the continuing mercury exceedances under the exacting standard. By June 9, 1992, the State and Respondent had resolved their differences in a consent agreement, including imposition of a $100,000

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[5] To put this measure in perspective, 2 ppb for mercury is allowable for drinking water. Ironically, if the facility had been new and lacked a demonstrated record of meeting a strict discharge limit, it could have obtained a NPDES permit with 200 ppb as the daily maximum discharge limit for mercury.

[6] It was a standard that one consultant characterized as an "'extremely difficult and complex problem,' inasmuch as all available manufacturer's information and reliable equipment on the market demonstrated that current technology was capable of reducing mercury only down to a range of 2 ppb to 5 ppb." *Id.* at 594.

fine payable to the State for the violations. On June 10, 1992, a state circuit court judge approved the settlement, retaining jurisdiction to oversee the implementation of the decree. *Id.* at 595.

B. Commencement of the Citizen Suit

The long-term involvement of the State ultimately resulted in a meaningful method for resolving all the pollution discharge problems. In fact, the trial court held that the facility was in "substantial compliance" with its NPDES permit requirements by March 1991 and was in complete compliance by October 1992. With these facts in mind, the citizen groups could not play any meaningful role in the enforcement process under the CWA and *Gwaltney*. However, on June 12, 1992, only two days after the entry of the second consent decree – in which the state court had taken jurisdiction over this very matter -- petitioners commenced a CWA lawsuit.

C. The Trial Court Refuses to Dismiss the Complaint

Given the administrative and state court history, Respondent moved to dismiss the complaint under Section 505(b)(1)(B) of the CWA (33 U.S.C. § 1365(b)(1)(B)) because the State of South Carolina had "diligently prosecuted" the issue of its permit compliance. According to the trial court, the issue raised by Respondent "involve[d] a delicate balance between the Act's preference for governmental enforcement efforts and the recognized policy of allowing citizens to participate in the enforcement process." 890 F. Supp. 470, 489 (D.S.C. 1995). In what

appears to have been a fundamental error, the trial court looked to EPA civil penalty policies as its "diligence yardstick." [7] It is the EPA's policy that civil penalties must recover at least the amount of the permit holder's "economic benefit" of non-compliance. *Id.* at 493. On that basis, the trial court determined

> that because recoupment of a violator's economic benefit of noncompliance is central to the enforcement of the CWA, the failure of the state enforcement agency to recover, or even to determine, a violator's economic benefit is strong evidence that the agency's prosecution of that violator was not diligent .
> . . .

Id. at 497.

On that basis, the trial court refused to dismiss the case.[8]

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[7] "State enforcement programs are not required to be identical to the federal program." Environmental Law Handbook, T.F.P. Sullivan at 151. In formulating the civil penalty amount here, DHEC considered possible economic benefit to the respondent. See Trial Testimony of Robert R. Knaus, DHEC enforcement staff, Bureau of Water Pollution Control, Volume I, October 26, 1993.

[8] To its credit, however, the trial court recognized that it was reading a new requirement into the CWA that could well disturb the State's role as the primary enforcement actor:

> The court agrees that no language in the CWA directly requires a state enforcement agency to calculate economic benefit when determining what an appropriate civil penalty should be. In other words,

The trial court's new requirement thus elevated the citizen suit to a status equal to the State of South Carolina's enforcement activities, even though, as the trial court acknowledged, "[d]eference to governmental enforcement agencies is appropriate because the CWA delegates the primary enforcement responsibility to designated state and federal agencies." *Id.* at 487.[9]

> the CWA does not require states to replicate standards or procedures for assessing penalties under the state's water pollution control laws.

Id. at 494.

[9] A number of other cases hold that the federal courts should not entertain citizen suits in which the plaintiffs merely seek *additional* civil penalties above and beyond those imposed in the state court proceedings. *Conn. Fund for Environment v. Contract Plating Co.*, 631 F.Supp 1291, 1293 (D. Conn. 1986). *See also Arkansas Wildlife Fed'n v. ICI Americas Inc.*, 842 F. Supp. 1140, 1147 (E.D. Ark. 1993), *aff'd*, 29 F.3d 376 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1094 (1995) ("the state [enforcement] agency must be given great deference to proceed in the manner it considers in the best interests of all parties involved"); *Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co.*, 777 F. Supp. 173, 179, 186 (D. Conn. 1991), *aff'd in part and rev'd in part*, 989 F.2d 1305 (2d Cir. 1993) (limitations on citizen suits "allow for smoother operation of ordinary enforcement mechanisms" and encourage out-of-court settlements between agencies and polluters). *Cf. Supporters To Oppose Pollution, Inc. v. Heritage Group*, 973 F.2d 1320, 1324 (7th Cir. 1992) (Resource Conservation and Recovery Act (RCRA) suit: "An Administrator unable to make concessions is unable to obtain them. A private plaintiff waiting in the wings then is the captain of the litigation. . . . To say . . . that the EPA is not 'diligently prosecuting' the action if it does not sue the person, or use the theories, the plaintiff prefers would strip the EPA of the control the statute provides.").

The trial court's reasoning pulled the rug out from under the State of South Carolina's good faith enforcement efforts here, and left open to federal judicial review every state compliance decision. Under this reasoning, there always will be *someone* to complain that the penalty imposed by a state agency or court was "insufficient." As acknowledged by the trial court here, the "determination of economic benefit is susceptible to several different methods of calculation." *Id.* at 497. *See also PIRG v. Powell Duffryn Terminals Inc.*, 913 F.2d 64, 80 (3d Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991) ("Precise economic benefit to a polluter may be difficult to prove."). Calculating the amount of a civil penalty -- and the myriad of other enforcement decisions that arise during the administrative process -- necessarily involves the exercise of discretion that is appropriately left to state agencies. Where, as here, there was no evidence of untoward conduct or bad faith, the State's judgment as to the appropriate state court penalty and administrative technical solutions to the equipment problems should not be subjected to federal judicial review operating under "20-20 hindsight."

D. The Trial Court Denied Injunctive Relief, But Imposed Additional Civil Penalties

The trial court's decision to allow the case to proceed notwithstanding the State's enforcement role resulted in five years of pointless litigation. Ironically, the trial court ultimately denied petitioners' request for injunctive relief but assessed $405,800 in civil penalties *in addition to the $100,000 fine previously imposed by the state court consent decree*. *Id.* at 612. All those years of litigation occurred despite findings that Respondent's compliance record was

satisfactory, and that the State had properly and fully performed its enforcement role under the CWA. Specifically, the trial court found that

> Laidlaw has been in substantial compliance with all parameters in its NPDES permit since at least August 1992. . . . In fact, Laidlaw has been in compliance with the vast majority of its permit requirements for a much longer period of time, extending back to March 1991 when the Lancy [mercury reduction] system was installed.

Id. at 611.

Critical to the issues before this Court, the trial court found that the state Department of Health and Environmental Control (DHEC) had been instrumental in achieving this commendable compliance record:

> DHEC was made aware on a continuous basis of the compliance problems Laidlaw was experiencing. An open line of communication between Laidlaw and DHEC existed throughout the time period relevant to this litigation. Further, DHEC's knowledge of these problems, its enforcement efforts with respect thereto, and the agency's continued involvement with Laidlaw in achieving a solution to these problems have resulted in Laidlaw's ultimate compliance with its NPDES permit over an extended period of

> time.

Id. at 602.

Because of the good compliance record and the lack of demonstrated harm to the environment, the trial court denied injunctive relief in all respects. Nonetheless, it increased the civil penalty assessed by the State, thereby second-guessing the state agency's enforcement decisions. According to the trial court, the state penalty was "not enough" of a penalty based solely on the amount of the state court consent decree. That decision represents a wholesale repudiation of the State's enforcement role. Moreover, it also became unnecessary in light of the Court's subsequent decision in *Steel Co.*

E. Reversal by the Court of Appeals

Based on the trial court's ultimate findings after trial, petitioner's case for injunctive relief was substantially moot by June 1992 and certainly completely moot two months later -- entirely as a result of the enforcement efforts of the State. The Court of Appeals properly applied *Steel Co.* to the civil penalty portion of the case and had little trouble dismissing the rest of the case as moot where petitioners had abandoned their injunction case on appeal.

The finding of mootness was well grounded, and certainly can be affirmed for a variety of reasons found in the record. As the trial court found, Respondent was in compliance with "the vast majority" of its permit requirements by March 1991 and with "all" its permit

requirements by August 1992. 956 F. Supp. at 611. Furthermore, most of the pre-1992 permit exceedances occurred while respondent -- with the State's knowledge and under its supervision -- experimented with various technologies to bring its plant into compliance. *Id.* at 600. It was not surprising then that only nine isolated permit exceedances occurred between June and August 1992, since the State already had put in motion the measures necessary to cure the technical discharge problems. *Id.* Those exceedances likewise occurred during a period of experimentation with various operational systems following the state court's entry of the first consent decree. Those experiments eventually achieved a solution that met the 1.3 ppb mercury limit in the NPDES permit. *Id.* at 595. Thus, the State's enforcement activity clearly resolved any type of CWA problem that petitioners might have theoretically alleged in their complaint, and certainly made unnecessary at the very outset of the federal case the need for the injunction sought by petitioners.

Finally, as noted in Respondent's Rule 21 Motion pending before this Court, continuing state enforcement activities have made the citizen suit even more superfluous. Pursuant to a June 2, 1997 consent agreement with DHEC, Respondent agreed to close the operations of the South Carolina facility at issue based on economic reasons relating to the hazardous waste incineration market and not this case. Accordingly, the plant has not made any discharges under its NPDES permit since September 1, 1998, nor has it received any waste from which to generate discharges. Indeed, the incinerator that generated the plant's effluent discharges has been removed, and the plant put up for sale. The state

environmental agency has overseen this closure process, and petitioners' suit has had no impact on this closure process in any manner. Simply put, this particular citizen suit has been and remains a pointless exercise of federal court litigation.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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July 19, 1999